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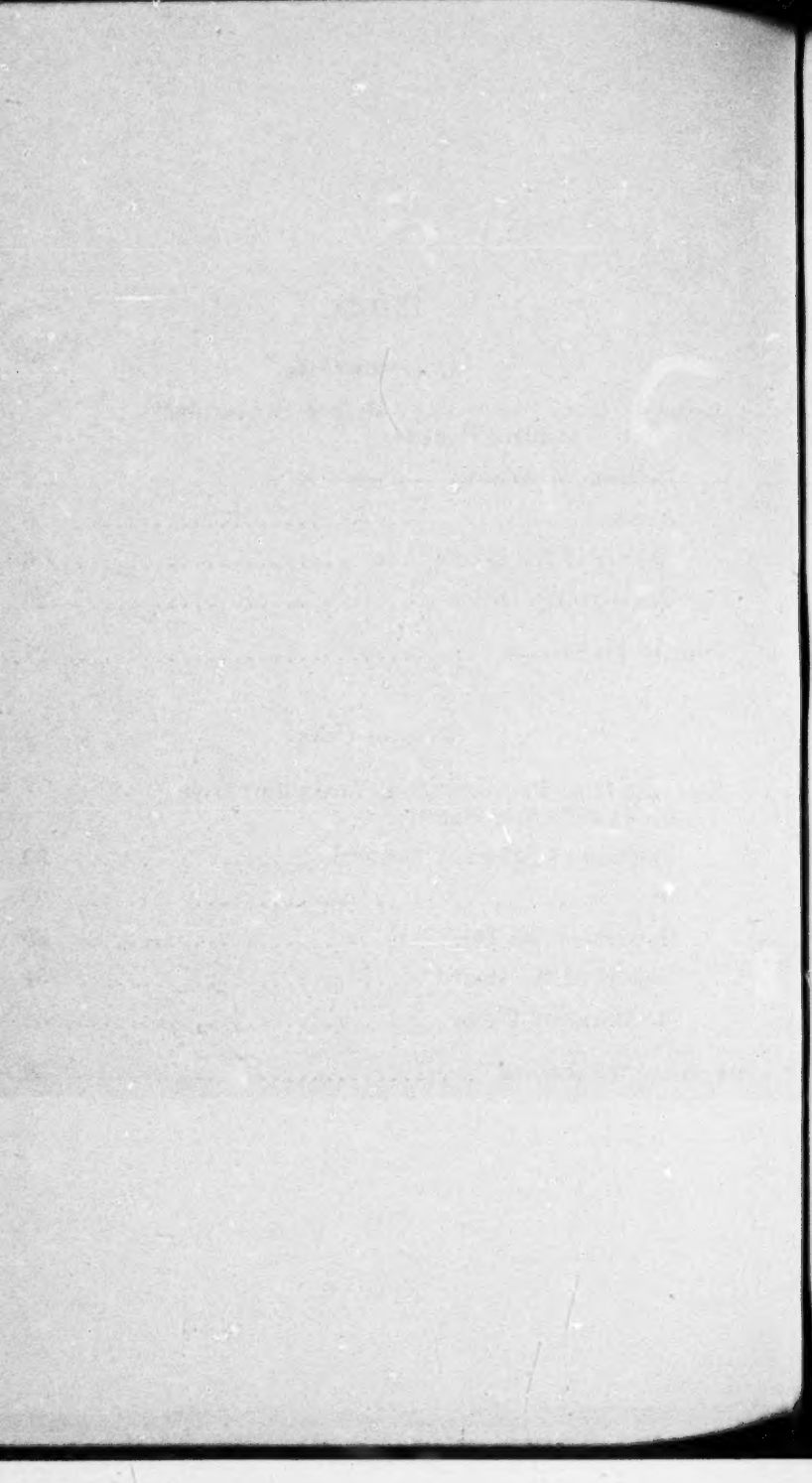
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,492

WILLIAM ALBERTSON, *Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent.*

No. 17,623

ROSCOE QUINCY PROCTOR, *Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent.*

On Review of Orders of the Subversive Activities
Control Board

JOINT APPENDIX

IN THE SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. I-1-62

ROBERT F. KENNEDY, Attorney General of the United States,
Petitioner,

v.

WILLIAM ALBERTSON, *Respondent.*

On petition for an order to require William Albertson to register and to file a registration statement with the Attorney General as required by Section 8(a) and (c) of the Subversive Activities Control Act of 1950, as amended, pursuant to Section 13(a)

(Filed May 31, 1962)

The Attorney General respectfully represents to the Subversive Activities Control Board that there is in effect a final order of the Board requiring the Communist Party of the United States of America, hereinafter referred to as the Communist Party or the organization, to register under Section 7(a) of the Subversive Activities Control Act of 1950, as amended (hereinafter referred to as the Act) as a Communist-action organization; that such order became final on October 20, 1961; that pursuant to Section 13(k) of the Act such order was published in the Federal Register on October 21, 1961; that more than sixty days have elapsed since such order became final; that such organization has not registered with the Attorney General nor has it filed a registration statement under Section 7 of the Act as a Communist-action organization; and that no officer thereof has registered for and on behalf of such organization or filed a registration statement for and on behalf of such organization as required by Section 7(h) of the Act and by the Attorney General's Regulations, 28 C.F.R., Section 11.205.

The Attorney General further respectfully represents to the Board that the respondent, a natural person, was at

all times mentioned herein, and continues to be, a member of the Communist Party of the United States of America, a Communist-action organization, and as such was required under Section 8(a) and (c) of the Act to register and to file a registration statement with the Attorney General on or before December 20, 1961, and that respondent has failed to do so and continues to fail to do so.

In support of this petition, the Attorney General alleges the following facts, based upon information and belief, relating to the membership of respondent in the Communist Party, to wit:

I

During the months of January and February, 1962, and on divers occasions prior thereto, the respondent made statements disclosing that he was a member of and that he was a functionary of the Communist Party.

II

During the months of December, 1961, and January and February, 1962, and on divers occasions prior thereto, the respondent attended meetings of the Communist Party, the attendance at which was restricted to Communist Party members.

III

On or about December, 1959, the respondent was elected a member of the National Committee of the Communist Party, and from on or about January, 1960, to the date hereof has served as a member of the New York State Committee and the New York State Board of the Communist Party.

IV

During the months of January, and February, and April, 1962, the respondent discussed and imparted information regarding Communist Party policy and activities with members of the Communist Party.

WHEREFORE, your petitioner prays that the Board enter an order against the respondent requiring him to register and to file a registration statement with the Attorney General as a member of a Communist-action organization in the manner required by the Act.

Respectfully submitted,

ROBERT F. KENNEDY

Robert F. Kennedy

Attorney General

J. WALTER YEAGLEY

J. Walter Yeagley

Assistant Attorney General

ORAN H. WATERMAN

Oran H. Waterman

Attorney,

Department of Justice

JAMES A. CRONIN, JR.

James A. Cronin, Jr.

Attorney,

Department of Justice

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss:

ROBERT F. KENNEDY, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

ROBERT F. KENNEDY

Robert F. Kennedy

Sworn to before me this 31st day of May, 1962.

EVELYN G. DODD

Notary Public, D. C.

My Commission expires June 14, 1963.

Answer

(Filed June 25, 1962)

The respondent, answering the petition:

1. States that sections 8 and 13 of the Subversive Activities Control Act, on their face and as sought to be applied in this proceeding are unconstitutional in that they violate the Fifth Amendment privilege against self-incrimination, which respondent hereby asserts, and the First Amendment, and deny respondent due process of law and trial by jury as required by the Fifth and Sixth Amendments and Art. III, sec. 2, cl. 3, and constitute a bill of attainder.

2. States that the petition fails to allege facts warranting issuance of the order prayed for.

3. Denies the allegation that the Communist Party of the United States of America is a Communist-action organization.

4. In reliance upon the privilege against self-incrimination, refuses to answer the allegation that respondent was and continues to be a member of the Communist Party of the United States of America and the allegations of paragraphs I to IV, inclusive, of the petition.

WILLIAM ALBERTSON

STATE OF NEW YORK }
 COUNTY OF NEW YORK } ss:

WILLIAM ALBERTSON, being duly sworn, deposes and says that he is the respondent above named and has read the foregoing answer and knows the contents thereof and that the same is true to the best of respondent's knowledge and belief.

WILLIAM ALBERTSON

Subscribed and sworn to before me this 14th day of June, 1962.

BLANCH FREEDMAN
Notary Public

JOHN J. ABT
 John J. Abt,
 320 Broadway,
 New York 7, N. Y.

JOSEPH FORER
 Joseph Forer,
 711 14th Street, N. W.
 Washington 5, D. C.

Attorneys for Respondent.

Report of the Board

(Filed October 29, 1962)

PRELIMINARY STATEMENT

This is a proceeding on petition of the Attorney General, filed May 31, 1962, for an order of the Board requiring the respondent, William Albertson, to register and file a registration statement with the Attorney General as required of members of a Communist-action organization by section 8(a) and (c) of the Subversive Activities

Control Act of 1950, as amended.¹ Pertinent parts of the Act are set forth in Appendix "A" attached and made a part hereof.

The petition alleged that Albertson was at the time of the filing of the petition and at least since 1959 had been a member of the Communist Party of the United States of America;² that on October 20, 1961, an order of this Board became final requiring said Communist Party to register under section 7 of the Act as a Communist-action organization; and, that by reason of the failure of the Communist Party or any officer thereof to register and file a registration statement as prescribed in the Act, it became the duty of Albertson himself to register which he failed to do and continues to fail to do. In support of the petition, the Attorney General set forth, in paragraphs numbered "I" through "IV", allegations of facts relating to the membership of respondent in the Communist Party, including his making of statements disclosing such membership, his attendance at meetings restricted to members of the Party, his election to membership on the National Committee of the Party, his serving as a member of the New York State Committee and the New York State Board of the Party, and his discussions of Communist Party policy with other members of the Party.

Respondent, on June 25, 1962, filed an answer to the petition attacking the constitutionality of sections 8 and 13 of the Act; stating that the petition fails to allege facts warranting issuance of the order prayed for; denying the allegation that the Communist Party of the United States

¹ At the time of filing the instant petition, the Attorney General also filed similar petitions against nine other individuals. Each of the nine individuals was represented by the same counsel, attorneys John J. Abt and Joseph Forer, who represented the respondent in this proceeding. Virtually identical answers were filed by each respondent.

² For convenience the Communist Party of the United States of America will sometimes be referred to herein as "the Communist Party" or "the Party."

of America is a Communist-action organization; and relying upon the privilege against self-incrimination in refusing to answer the allegation that respondent was and continues to be a member of the Communist Party and the allegations of paragraphs I to IV, inclusive, of the petition.

Pursuant to Rule 201.7(a) revised, of the Board's Rules of Procedure, the reliance in respondent's answer to the petition upon the constitutional privilege against self-incrimination operates as a denial for purposes of the Board proceeding.

A consolidated prehearing conference in this and the similar cases (see footnote "1," *supra*) was held on July 2, 1962. Thereafter the Board, on July 6, 1962, entered an order acting upon matters raised at the prehearing conference. Counsel for respondent having requested and counsel for petitioner having agreed to a postponement of the original earlier hearing date, the hearing was rescheduled and began on September 11 and concluded on September 24, 1962, in Washington, D. C., before the undersigned members of the Board.

Counsel for petitioner presented the oral testimony of four witnesses and three exhibits (Attorney General Exhibits 1-3, inclusive). No witnesses were presented on behalf of respondent. One exhibit, a prior report of one of petitioner's witnesses, was offered by respondent and received in evidence (Albertson Exhibit 6).³ At the conclusion of the hearing closing argument was made by counsel for petitioner. (Tr. 290-302.) Counsel for respondent stated:

I think the record in this case speaks for itself, Mr. Chairman, and I see no occasion for me to elaborate my position at this time. (Tr. 302.)

³ Receipts for money paid to petitioner's witnesses by the Federal Bureau of Investigation were given exhibit numbers for purposes of identification but were not offered in evidence. As will appear, the witnesses were cross-examined in detail on money they received from the F.B.I.

Petitioner, on October 8, 1962, filed and served proposed findings of fact consisting of forty numbered paragraphs. Respondent's proposed findings of fact, filed on October 15, 1962, were as follows in proposing the conclusion that the petition should be denied:

1. The petitioner has offered no evidence in support of the allegation in the petition that the Communist Party of the United States is a Communist-action organization.

2. The evidence introduced by petitioner, even if fully credited, would not establish by a preponderance of the evidence that the respondent is a member of the Communist Party of the United States within the meaning of the term "member" in the Subversive Activities Control Act.

The proposed findings submitted by both sides have been considered in making findings and conclusions herein.⁴

The witnesses who gave oral testimony on behalf of petitioner as follows:

Mrs. Lulu Mae Thompson, a housewife of Lathrop, California (tr. 39-40, 80). She joined the Communist Party in June of 1953 and ceased membership on March 30, 1962 (tr. 40). While a member of the Communist Party she was treasurer of the Communist Party's Local 17 County Club of San Joaquin County, chairman of the Sacramento-San Joaquin Valley Section of the Party, member of the Party District Committee of Northern California, and a delegate to the 17th National Convention of the Party (tr. 40).

⁴ It was stipulated by counsel for both sides that following argument and the submission of proposed findings the Board would proceed to consider the record and issue an appropriate report and order without first issuing an initial or tentative decision. (See Order entered July 6, 1962, following prehearing conference.)

Allen R. Prince, a salesman of food products of Brooklyn, New York (tr. 99, 119). He joined the Communist Party in October 1959, and was a member at the time of this hearing (tr. 99). During his Communist Party membership he was financial treasurer of the Brooklyn Youth Club of the Party, and in November of 1960 became organizer of the Club; member of the Executive Board of the Club; member of the King's County Council of the Communist Party; and member of the Party's New York State Youth Committee or Commission (tr. 99-100).

Mrs. Ethel Newton, of New York City, the executive assistant of a private high school in New Jersey (tr. 155, 189). She was a member of the Communist Party from 1947 until late 1949 and then rejoined in 1955 and was a member at the time of this hearing (tr. 155, 189-190). While a member of the Party during the most recent period she was organizer of the Village Club 2 of the Party, coordinator of the Club, organizer of the Village Section of the Party, member of the New York County Communist Party Council, and member of the Committee and Coordinating Committee of the New York State Communist Party (tr. 156).

Albert Jackson, a refrigeration mechanic, of New York City (tr. 270-271). He first joined the Communist Party in Pittsburgh in 1945 (tr. 266). He was a member of the Party at the time of testifying in this hearing (tr. 231). For about eight months up to the time of testifying he has been chairman of the Eleventh A.D. Communist Party Club in New York City (tr. 231-232, 245-246). Other positions he has held in the Party were: Press Director of the Club, Education Director of the Club, representative of the Harlem Region of the Party to the New York State Party Committee (assigned in April of 1961), and member of the Harlem Regional Committee of the Party (tr. 232, 242).

Each of petitioner's four witnesses was a paid informant for the Federal Bureau of Investigation during his mem-

bership in the Communist Party, in the instances of Newton and Jackson during the latter period of their membership. While members of the Party and informants for the F.B.I. they reported to the F.B.I. on the activities of the Party, and received money from the F.B.I. for both services and expenses.⁵ Prince and Thompson also served as paid informants before becoming members of the Party. Full opportunity for cross-examination of these witnesses was afforded and pertinent copies of their prior reports to the F.B.I. were delivered to counsel for respondent for use in cross-examination. The cross-examination was directed mainly to items, such as money received from the F.B.I., going to possible interest of the witnesses. There was no rebuttal testimony of any of the testimony given by these witnesses and their testimony was mutually consistent and corroborative. By way of closing argument counsel for respondent elected to stand on the record (*supra*). His proposed findings did not raise specific matters going to the credibility of any of these witnesses. The Board, having observed the witnesses and considered the entire record, credits the witnesses.

Production of Reports of Petitioner's Witnesses

At the conclusion of the direct examination of each of the four witnesses presented by petitioner, there were delivered directly to counsel for respondent by counsel for petitioner the receipts that the witness had signed for money received from the F.B.I., and the prior written reports made by the witness to the F.B.I. which counsel for petitioner considered to be statements within the purview

⁵ Generally, the amount received from the F.B.I. increased with the time that a particular witness was in the Party and furnishing more information. For instance, the witness Lulu Mae Thompson received around \$25.00 a month when she first started reporting and this was increased to \$75.00, then to \$100.00 and ultimately to \$225.00 (Tr. 81-96.) The witness Albert Jackson received about \$1600.00 for the first seven months in the year 1962. (Tr. 271.) The husband of the witness Thompson and the wife of the witness Prince were also paid informants for the F.B.I. (E.g., tr. 90; 137-138.)

of Title 18 U.S.C. § 3500.⁶ At the same time there were delivered to the Board for *in camera* examination other documents representing information furnished to the F.B.I. by the witness. These documents were in two categories: (a) reports prepared by the witness, which counsel conceded to be statements but considered not to contain any material which related to the subject matter of the witness' testimony, and (b) reports prepared by agents of the F.B.I. following oral interviews with the witnesses, which counsel considered not to contain related matter and also not to be statements within 18 U.S.C. 3500. (See tr. 70-73; 111-113; 184-186; 250-252.)

These documents, numbering in excess of fifteen hundred, were examined by the Board *in camera*. Certain of of them were determined to contain related material, and from these excisions of unrelated portions were requested by counsel for petitioner in a few instances and were considered and granted by the Board. The documents were then delivered to counsel for respondent who, after reviewing them, did not desire further cross-examination of the witnesses involved (tr. 152; 284).⁷ With respect to the category of documents in the form of memoranda prepared by agents of the F.B.I. on oral information furnished by the witnesses, it was unnecessary in any instance to determine whether the agents' memoranda qualified as statements of the witnesses under 18 U.S.C. 3500. In all but three instances this category of documents did not contain any material that related to the subject matter of the witnesses' testimony. In the instances of the documents that did contain related material, the question whether they were "statements" was waived by counsel for petitioner (tr. 152, 284-285).

⁶ Lists of reports that were turned over directly to counsel for respondent appear at transcript pages 275 to 281, inclusive.

⁷ The additional documents that were delivered to counsel for respondent were: three reports of the witness Thompson; one report of the witness Prince; and three reports of the witness Newton.

In each instance, counsel for respondent noted for the record objections to the Board determination that the documents not produced were not relevant, to the determination that certain of the reports were not statements without taking extrinsic evidence, and to the excision of any material from those documents that were produced (tr. 153; 285). The objections were overruled and the documents were made Board exhibits, sealed, as follows: the Thompson documents, Board Exhibit 1; The Prince documents, Board Exhibit 2; the Newton documents, Board Exhibit 3; and the Jackson documents, Board Exhibit 4 (tr. 153-154; 285).

THE ISSUES

The primary issue in this proceeding is, as stated by counsel in their opening statements, whether the respondent, William Albertson, is (or at the times mentioned in the petition, was) a member of the Communist Party of the United States of America. (See, tr. 35-36.) Another issue, raised by counsel for respondent, is whether the Communist Party of the United States is a Communist-action organization. (See tr. 38-39 and Respondent's Proposed Finding No. 1.) We will treat first with the latter.

Counsel for petitioner, at the outset of the hearing, requested the Board to take official notice for the purposes of this proceeding of an order which the Board entered and of subsequent proceedings in the matter of the Communist Party of the United States of America (tr. 33-34). Counsel for respondent objected to such official notice. The grounds were that William Albertson, respondent herein, was not a party to the proceedings involving the Communist Party and was not, and cannot be bound by those proceedings and hence they are not competent with respect to him here (tr. 39).

The clear intent of the Act is that once an order of this Board has become "final" requiring an organization to register as a Communist-action organization, the issue

whether the organization is of such type is not to be relitigated in subsequent proceedings for the registration of a member of the organization. The Act provides for the registration of any member of an organization concerning which "there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization." (Section 8(a).) Thus an "issue" in a proceeding for the registration of an individual member is whether there is in effect a final order requiring the registration of the organization to which the individual is alleged to belong.⁸ Counsel for respondent did not, and could not dispute the fact that there is in effect a final order of the Board requiring the Communist Party, U.S.A., to register as a Communist-action organization. (See the facts set forth below under the subheading "Official Notice.")

It would be a plainly unreasonable application of the Act to require that in a proceeding involving an individual, if shown to be a member of the Party and thus fairly represented in the Party proceeding, the status of the Party must nonetheless be relitigated.⁹ To do so would frustrate the purpose of the Act to obtain disclosure of the members of a communist-action organization.

FINDINGS OF FACT

1. *Official Notice*

For the reasons indicated above, respondent's objection to the taking of official notice was overruled and the parties were notified that official notice would be taken of the following which are hereby deemed to be facts for the

⁸ The Act provides full opportunity for an organization that has been determined to be a Communist-action organization to obtain subsequent relief from the registration requirements by proper showing that it is not then a Communist-action organization. Sections 13(b) and (1)(1).

⁹ The Board, in the proceeding involving the Communist Party, on the basis of a record comprising over 14,000 pages of oral testimony and hundreds of exhibits, in which the Party was represented by competent counsel, determined the Party to be a Communist-action organization as defined in the Act.

purposes of this proceeding. (See tr. 148-151.) No evidence was offered by respondent to rebut these facts.

1. The Subversive Activities Control Board on April 20, 1953, entered an order requiring the Communist Party of the United States of America to register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950;

2. The United States Court of Appeals for the District of Columbia Circuit on July 30, 1959, entered its judgment in Communist Party of the United States of America v. Subversive Activities Control Board, which affirmed the order of the Board requiring the Communist Party of the United States of America to register as a Communist-action organization;

3. The Supreme Court of the United States on October 10, 1961, entered its mandate which affirmed the judgment of the United States Court of Appeals for the District of Columbia Circuit, which judgment had been entered by the said United States Court of Appeals on July 30, 1959, in Communist Party of the United States vs. Subversive Activities Control Board;

4. More than ten (10) days have elapsed since the Supreme Court entered its mandate on October 10, 1961, in Communist Party of the United States of America v. Subversive Activities Control Board No. 12, October Term, 1960;

5. There was published in the Federal Register for October 21, 1961, Volume 26, No. 204, at page 9923, a notice by the Subversive Activities Control Board of the fact that the order of the Board requiring the Communist Party of the United States of America to register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950 became final on the 20th day of October 1961; and

6. More than sixty (60) days have elapsed since October 20, 1961.

It was stipulated by counsel and the Board finds: that the Communist Party of the United States of America has not registered with the Attorney General nor filed a registration statement pursuant to section 7 of the Act; that no officer of the Communist Party nor any authorized representative of the Party has registered for and on behalf of the organization pursuant to section 7(h) of the Act; and, that the respondent, William Albertson, has not registered or filed a registration statement with the Attorney General pursuant to section 8(a) and (c) of the Act. (Tr. 34-35.)

2. Evidence of Party membership of Respondent

Petitioner's witnesses Prince, Newton and Jackson identified the respondent, William Albertson, by pointing him out as present in the hearing room, seated at counsel table (tr. 100-101; 156-157, 232). Each of these witnesses testified to meetings of specific, constituent, organizational parts of the Communist Party of the United States of America which the witness attended and at which Albertson was among those present and participated. Albertson did not take the stand to deny or explain his presence at and participation in these meetings and no witnesses were presented by respondent to rebut or contradict the testimony given by petitioner's witnesses. Findings based upon the testimony of these witnesses will now be made.

a. Testimony of Ethel Newton

The witness Ethel Newton testified to specific Communist Party activities of Albertson during the period of years from December 1959 to July 1962 (tr. 156-183.)

Albertson was present at the National Convention of the Communist Party of the United States of America which was held in December 1959 in New York City (tr. 156). At the National Convention, Albertson gave a report on youth in which he stated that shortly following the convention

the National Committee would appoint a Youth Commission (tr. 157-158). No other National Conventions of the Communist Party, U.S.A., have taken place since the one in December 1959 (tr. 162).¹⁰

Albertson was present at the reconvened New York State Convention of the Communist Party held in January 1960 in New York City (tr. 162, 166). Nominations for members of the New York State Committee of the party were read by Ben Davis who stated that he had been elected National Secretary of the Party at the National Convention (tr. 167). Albertson made a statement in relation to the nomination of two youth members to the effect that under the Constitution of the Communist Party they were not eligible for election since they had not been in the Party long enough (tr. 169). Albertson was among those nominated for membership on the New York State Committee of the Party (tr. 168). The witness left the State convention before the elections and before the election results were announced (tr. 221). At a subsequent general membership meeting of the New York State organization of the Communist Party, also held in January 1960, the county organizer announced that Albertson was the Organizational Secretary of the New York State Communist Party (tr. 171-172).¹¹

In July 1961 Albertson was present at an enlarged meeting of the New York State Committee of the Communist Party (tr. 173-174).

At a meeting in November 1961 of the New York County Communist Party Council, held in New York City, Albert-

¹⁰ Other occurrences at the convention involving Albertson to which the witness Newton testified were also a subject of the testimony of the witness Thompson and findings thereon will be made in considering Thompson's testimony, *infra*.

¹¹ Albertson was not present at the general membership meeting (tr. 224-225). Respondent's motion to strike the testimony with reference to the announcement was denied with the understanding that the evidence would be considered only for the purpose of showing that Albertson was considered by the Party people to be a member of the Party (tr. 226).

son was among those present and gave a report on conditions confronting the Party under the McCarran Act (tr. 175-176). Albertson also announced that the meeting would be the last meeting of the New York County Council of the Party (tr. 176). Another speaker announced that Albertson would be relieved of his responsibilities in the Brooklyn organization of the Party in order to become coordinator of the New York County Coordinating Committee, which would take the place of the New York County Council, and that Albertson would be attached to the State Committee of the Party and be a full-time worker there (tr. 177).

A few days after this meeting Albertson met with the witness Newton at her home to discuss organizational matters in the Village area of the Party (tr. 178). This was in Albertson's capacity as New York Communist Party Coordinator (tr. 177). Later in the month of November 1961 a meeting of the New York County Coordinating Committee of the Communist Party, U.S.A., was held at at the home of the witness Newton (tr. 178-179). Albertson was present, acting as coordinator for the New York County of the Party, and stated that the Coordinating Committee would replace the old County Council, and that similar Coordinating Committees were being set up in all of the boroughs (tr. 179).

In January 1962 the witness Newton attended a meeting of the coordinators of all of the Communist Party clubs in New York County (tr. 179). Albertson, who was present, stated that the meeting was the first of a series of such meetings that would be called as there were problems to be discussed (tr. 180). The witness Newton was present at meetings of the New York County Communist Party Coordinating Committee in February, April, May and July of 1962, at which Albertson was present. At meetings in February he delivered the main report or brought announcements to the meetings (tr. 180-183). The meeting in May 1962 was at Newton's home as was the meeting

in July (tr. 182, 183). At the May meeting Albertson read a report recommending organizational changes involving the merger of certain areas (tr. 182): About ten days or two weeks after this (May) meeting, there was a meeting of all of the coordinators of all of the Party clubs in two of the areas which Albertson had said were to be merged (tr. 182-183). Albertson outlined the proposed changes and plans for a new Coordinator for the new area (tr. 183). He said there was no need for a vote because this was an organizational change (tr. 183).

During the months of January, February and April of 1962, Albertson was the Coordinator of the New York County Coordinating Committee of the Communist Party, U.S.A., to the knowledge of the witness Newton (tr. 182).

b. Testimony of Albert Jackson

As a representative from the Harlem Region of the Party, the witness Jackson attended meetings during the period from April to September 1961 of the New York State Communist Party Committee (tr. 232-233). At a meeting in June 1961 Albertson was present and participated in the discussion and postponement of a report that was to have been given by the Harlem Region (tr. 233-234). At the meeting in July 1961 Albertson gave a report on the expulsion of a named individual, stating that factional groups or persons who disagree with the leadership or the policy of the leadership will not be tolerated and will be removed, that unity of the Party was a must (tr. 235-236). At the meeting in August 1961, at which Albertson was present, action was taken by the Committee to remove certain members from their positions because they were part of a factional group but they were allowed to stay on the Committee (tr. 239-240).¹²

¹² On cross-examination it was developed that anyone present at the State Committee meetings could take part in discussions but only members of the Committee could vote (tr. 265-266). The record is not clear as to whether Albertson actually voted.

Jackson testified to two meetings of the Harlem Regional Committee of the Party at which Albertson was present, one in December 1961, and the other in January 1962 (tr. 242-245). At the December meeting Albertson stated that the Party will not tolerate any factional groups, that the life of the Party was at stake and there is no room in the Party for anyone who disagrees with the decisions that are made by the leadership (tr. 243-244). At the January (1962) meeting Albertson criticized the approach taken by one of the "comrades" toward The Worker (tr. 244-245).¹³

Albertson was present and participated in meetings of the Party Club Chairmen, Harlem area, in January 1962, March 1962, April 1962, and May 1962 (tr. 246-249). At the January meeting Albertson read a report on political activity, unity of the Party, and the need to put more effort in a campaign to raise funds for The Worker (tr. 246-247). At the March meeting Albertson gave a report on the need for the "comrades" to get into mass organizations, preferably political organizations (tr. 247-248). Albertson made proposals at the April meeting of activities to be undertaken designed to serve the cause of the Party by recruiting members while at the same time minimizing attack from right-wing elements (tr. 248). At the May (1962) meeting Albertson reported on the proposed merger of the Washington Heights group and the Harlem group, and he gave the name of the coordinator between leadership and the merged area (tr. 248-249).¹⁴

In August 1961 the witness Jackson attended a meeting of the Communist Party New York State Board at which Albertson was present and participated in the discussion

¹³ The term "comrade" is used between members of the Communist Party as meaning a member of the organization (tr. 250).

¹⁴ Albertson also discussed this merger at a meeting in the same month of the New York Coordinating Committee (testimony of the witness Newton, *supra*).

(tr. 240-241). The discussion included statements that all club chairmen should go back to their clubs and try to initiate action within mass organizations in support of a third, permanent, political party, the Freedom Party (tr. 240-241).

The witness Jackson had dinner with Albertson in May 1962, at which time Albertson stressed the need for Jackson's Party club to take the initiative in election work in the area since Jackson's club was the central club in Harlem and all work should be geared around it (tr. 249-250). Albertson also told Jackson that he (Albertson) was thinking that Jackson would replace the assistant coordinator between the area and the Party leadership (tr. 250).

c. Testimony of Allen Prince

In early July 1962 the witness Prince attended a Communist Party class at which Albertson lectured on the role of the Communist Party (tr. 110). About a week before the classes, Prince had attended a meeting, at which Albertson was present, of the Communist Party New York District Youth Coordinators (tr. 111).

During the year 1961 the witness Prince attended meetings of the New York State Communist Party Youth Commission (tr. 100). The highest position on the Commission was that of Chairman-coordinator (tr. 100). The position was held in 1961 by Albertson (tr. 100-101). The witness Prince first learned this at a meeting of the Commission when Albertson announced that he would be Chairman-Coordinator of the Commission and that he had been elected Secretary of the New York State Youth Commission of the Communist Party (tr. 101).

In November 1961 there was a reorganization and the Communist Party Youth Coordinators Committee, New York District, was formed in the place of the Youth Com-

mission (tr. 105).¹⁵ The witness Prince attended one meeting of the Coordinators Committee after it was formed; this meeting was held a few weeks following the formation, in late November 1961 (tr. 105-106). Albertson was present and gave the main report on the provisions of the McCarran Act (tr. 106).

Prince, in the preceding month (October 1961) had attended another meeting at which the McCarran Act was the subject of discussion (tr. 106). This was a meeting of the King's County Council of the Communist Party (tr. 107). Albertson stated at the meeting that if the members were arrested they should take the Fifth Amendment, not the First Amendment, and that if they were to receive the registration forms they were to be returned unanswered since the Communist Party had no intention of surrendering the list of its members or any records (tr. 106-107).

Prince was present at an earlier meeting of the King's County Council of the Communist Party that took place in August 1961 (tr. 107-109). At this meeting it was announced that Albertson would serve as chairman of the Administrative Committee of the King's County Council of the Party (tr. 109). Albertson held this position until October 1961 when, at a meeting of the Council at which Albertson was present the chairman of the New York State Communist Party requested that Albertson be released for reassignment (tr. 108-110).

d. Testimony of Lulu Mae Thompson and Ethel Newton
(17th Convention of the Party)

The witness Thompson was a delegate from her Communist Party organization in California to the 17th National

¹⁵ The reorganization was discussed and approved at a Communist Party Youth caucus at which Albertson presided (tr. 102-105). Attendance was not restricted to members of the Communist Party (tr. 228-229; Albertson Exhibit 6).

Convention of the Communist Party that was held in December 1959 in New York City (tr. 40-41). The witness Newton also attended this convention (*supra*). Newton observed the presence of Albertson and heard him read a report (*supra*). The convention adopted certain changes in the Constitution of the Communist Party, U.S.A. (Thompson, tr. 46-47, 282; Newton, tr. 158-159). Under the Constitution, as amended, only members of the Party who had been in good standing for at least five years were eligible for election to the National Committee, and to be eligible for election as a state officer or member of the state committee a member had to be in good standing for at least two years (A.G. Ex. 1, pp. 15 and 10, and A.G. Ex. 2).

At the National Convention, Albertson was one of the people nominated for membership on the National Committee of the Party (Newton, tr. 159-161). Albertson did not decline the nomination or withdraw his name (Newton, tr. 161). Newton testified that on the last day of the convention the election of the National Committee took place (tr. 161). She left the convention before the results were announced (tr. 187-188).¹⁰ At subsequent Party meetings which she attended official reports were made on the events and highlights of the National Convention (tr. 167, 169-171).

The witness Thompson was present at the session of the convention when the results of the election were reported by the elections committee (tr. 59-60). She made notes of the names of the people whom the election committee reported as having been elected and from them prepared a report to the F.B.I. and then the notes were destroyed (tr. 60-69). Thompson stated that at the time she made her report it accurately reflected the results as read by

¹⁰ Since Newton was not present at the National Convention when the elections occurred she does not know whether Albertson was present at that time (tr. 187-188).

the elections committee (tr. 63-64). Thompson had no independent recollection of hearing the name Albertson read by the elections committee and her report did not refresh her recollection (tr. 62-63). Over objection portions of her report to the F.B.I. were made a part of the record (tr. 66-69). This portion of Thompson's report listed Albertson among those elected to the National Committee of the Communist Party (tr. 65).

CONCLUSIONS

Taking all the facts together and considered as a whole it is clear that during the period covered by the petition the respondent, William Albertson, by what he has done and said, had the desire and intent to be a member of the Communist Party of the United States of America, and there has been meaningful recognition by the Party that it considers him as a member.

Albertson was nominated and elected a member of the National Committee of the Party at the Party National Convention in December 1959. There have been no national conventions held since his election. During 1961 and the first six months of 1962, immediately preceding the hearing herein, Albertson held important positions of leadership in the Party. Among these were: the highest position of the New York State Communist Party Youth Commission; Chairman of the Administrative Committee of the King's County organization of the Communist Party; and Coordinator of the New York County Communist Party.

There were numerous instances of meetings of Communist Party clubs and area organizations which Albertson attended and at which he took an active leadership part, reporting on matters of Communist Party policy and giving instructions from the Party leadership as to programs and activities to be undertaken by the club chairmen and members. Albertson showed a familiarity with the provisions of the Constitution of the Communist Party, and, in May 1962 was an instructor at a Communist Party class

where the subject of his instruction was the role of the Communist Party.

Albertson was shown to have conferred on various occasions with other persons holding leadership positions in the Communist Party with respect to the Party's plans. He has stressed to Party clubs the necessity for maintaining unity within the Party and the need to eliminate all factional groups or individuals.

Petitioner's evidence stands uncontroverted. It is impressive and persuasive that respondent, William Albertson, was at the time of the hearing, and since at least the year 1960 has been, a member of the Communist Party of the United States of America. The Board so finds by the preponderance of the evidence. There is in effect, and has been since October 20, 1961, a final order of the Subversive Activities Control Board requiring the Communist Party, U.S.A., to register under the Subversive Activities Control Act as a Communist-action organization.

The respondent, William Albertson, who has not registered under Section 8 of the Subversive Activities Control Act is in fact required to register under such section. An appropriate order accompanies this Report of the Board.

By the Board:

/s/ FRANCIS A. CHERRY, Member
Francis A. Cherry

/s/ THOMAS J. DONEGAN, Member
Thomas J. Donegan

/s/ JAMES R. DUNCAN, Member
James R. Duncan

/s/ EDWARD C. SWEENEY, Member
Edward C. Sweeney

, Vacancy

October 29, 1962
Washington, D. C.

Registration Order

(Filed October 29, 1962)

The Board, after appropriate hearing, having this day issued a report in writing in which it states its findings as to the facts and its conclusion that the respondent, William Albertson, is required to register under the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization as defined in the Act, it is

ORDERED, that the respondent, William Albertson, shall register under and pursuant to section 8(a) and (c) of the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization, and it is

FURTHER ORDERED that a copy of this REGISTRATION ORDER be served upon the respondent, William Albertson.

By the Board:

/s/ FRANCIS A. CHERRY, Member
Francis A. Cherry

/s/ THOMAS J. DONEGAN, Member
Thomas J. Donegan

/s/ JAMES R. DUNCAN, Member
James R. Duncan

/s/ EDWARD C. SWEENEY, Member
Edward C. Sweeney

, Vacancy

October 29, 1962
Washington, D. C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,492

WILLIAM ALBERTSON, *Petitioner*,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent*

Petition for Review

(Filed Dec. 26, 1962)

William Albertson, by his attorneys, petitions the Court to review and set aside the order of the Subversive Activities Control Board (hereafter called the Board) issued October 29, 1962, in the proceeding before the Board entitled Robert F. Kennedy, Attorney General of the United States, Petitioner v. William Albertson, Respondent, Docket No. I-1-62.

NATURE OF THE PROCEEDINGS

The order involved herein was issued under section 13(g)(2) of the Subversive Activities Control Act of 1950 (hereafter called the Act), 50 U.S. Code § 792(g)(2). It requires the petitioner herein to register under section 8(a) and (c) of the Act, 50 U.S. Code § 787(a) and (c), "as a member of the Communist Party of the United States of America, a Communist-action organization." The order was issued after proceedings before the Board initiated under section 13(a) of the Act, 50 U.S. Code § 792(a), by a petition of the Attorney General alleging that the petitioner was a member of the Communist Party of the United States of America and that neither he nor that organization had registered under the Act.

JURISDICTION AND VENUE

Jurisdiction and venue exist in this Court by virtue of section 14(a) of the Act, 50 U.S. Code § 793(a), which so far as is pertinent provides:

"The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, . . . may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside."

GROUND FOR RELIEF

1. Sections 8 and 13 of the Act, on their face and as applied, are unconstitutional. They violate the Fifth Amendment privilege against self-incrimination, which petitioner hereby asserts, and the First Amendment, and deny petitioner due process of law and trial by jury, as required by the Fifth and Sixth Amendments and Art. III, § 2, cl. 3, and constitute a bill of attainder.
2. The findings and order of the Board are based on erroneous constructions of the Act.
3. The findings and order of the Board are not supported by a preponderance of the evidence.
4. The findings and order of the Board are based on irrelevant evidence.
5. The Report of the Board fails to define adequately the grounds and reasoning of the order.
6. The Board erred in holding that petitioner was bound by the Board's prior determination that the Communist Party was a Communist-action organization.

RELIEF PRAYED

Wherefore, petitioner prays that the Court set aside the aforesaid order of the Board.

Respectfully submitted,

s/ **JOHN J. ABT**
John J. Abt
320 Broadway
New York 7, N. Y.

s/ **JOSEPH FORER**
Joseph Forer
711 14th St., N. W.
Washington 5, D. C.

Attorneys for Petitioner

IN THE SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. I-10-62

ROBERT F. KENNEDY, Attorney General of the United States,
Petitioner,

v.

ROSCOE QUINCY PROCTOR, *Respondent.*

On Petition for an Order to Require Roscoe Quincy Proctor to Register and to File a Registration Statement With the Attorney General as Required by Section 8(a) and (c) of the Subversive Activities Control Act of 1950, as Amended, Pursuant to Section 13(a)

(Filed May 31, 1962)

The Attorney General respectfully represents to the Subversive Activities Control Board that there is in effect a final order of the Board requiring the Communist Party of the United States of America, hereinafter referred to as the Communist Party or the organization, to register under Section 7(a) of the Subversive Activities Control Act of 1950, as amended (hereinafter referred to as the Act) as a Communist-action organization; that such order became final on October 20, 1961; that pursuant to Section 13(k) of the Act such order was published in the Federal Register on October 21, 1961; that more than sixty days have elapsed since such order became final; that such organization has not registered with the Attorney General nor has it filed a registration statement under Section 7 of the Act as a Communist-action organization; and that no officer thereof has registered for and on behalf of such organization or filed a registration statement for and on behalf of such organization as required by Section 7(h) of the Act and by the Attorney General's Regulations, 28 C.F.R., Section 11.205.

The Attorney General further respectfully represents to the Board that the respondent, a natural person, was at all times mentioned herein and continues to be, a member

of the Communist Party of the United States of America, a Communist-action organization, and as such was required under Section 8(a) and (c) of the Act to register and to file a registration statement with the Attorney General on or before December 20, 1961, and that respondent has failed to do so and continues to fail to do so.

In support of this petition, the Attorney General alleges the following facts, based upon information and belief, relating to the membership of respondent in the Communist Party, to wit:

I

During the months of January, February, and March, 1962, and on divers occasions prior thereto, the respondent attended meetings of the Communist Party, the attendance at which was restricted to Communist Party members.

II

At the last National Convention of the Communist Party, in December, 1959, the respondent was elected a member of the National Committee of the Communist Party. In March, 1962, and in the two year period immediately prior thereto, he served as a member of the District Committee of the Northern District of California.

III

During the months of January, February, and March, 1962, and on divers occasions prior thereto, the respondent discussed and imparted information regarding Communist Party policies and activities with members of the organization.

IV

During the months of January, February, and April, 1962, and on divers occasions prior thereto, the respondent was called upon for service in behalf of the Communist Party by members and officers of the organization.

WHEREFORE, your petitioner prays that the Board enter an order against the respondent requiring him to register and to file a registration statement with the Attorney General as a member of a Communist-action organization in the manner required by the Act.

Respectfully submitted,

ROBERT F. KENNEDY

Robert F. Kennedy

Attorney General

J. WALTER YEAGLEY

J. Walter Yeagley

Assistant Attorney General

ORAN H. WATERMAN

Oran H. Waterman

Attorney,

Department of Justice

THOMAS E. MARUM

Thomas E. Marum

Attorney,

Department of Justice

CITY OF WASHINGTON }
 DISTRICT OF COLUMBIA } ss:

ROBERT F. KENNEDY, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

ROBERT F. KENNEDY
 Robert F. Kennedy

Sworn to before me this
 31st day of May, 1962

EVELYN G. DODD
Notary Public, D. C.

My Commission expires June 14, 1963.

Answer

(Filed June 25, 1962)

The respondent, answering the petition:

1. States that sections 8 and 13 of the Subversive Activities Control Act, on their face and as sought to be applied in this proceeding are unconstitutional in that they violate the Fifth Amendment privilege against self-incrimination, which respondent hereby asserts, and the First Amendment, and deny respondent due process of law and trial by jury as required by the Fifth and Sixth Amendments and Art. III, sec. 2, cl. 3, and constitute a bill of attainder.

2. States that the petition fails to allege facts warranting issuance of the order prayed for.

3. Denies the allegation that the Communist Party of the United States of America is a Communist-action organization.

4. In reliance upon the privilege against self-incrimination, refuses to answer the allegation that respondent was and continue to be a member of the Communist Party of the United States of America and the allegations of paragraphs I to IV, inclusive, of the petition.

ROSCOE QUINCY PROCTOR

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA } ss:

Roscoe Quincy Proctor, being duly sworn, deposes and says that he is the respondent above named and has read the foregoing answer and knows the contents thereof and that the same is true to the best of respondent's knowledge and belief.

ROSCOE QUINCY PROCTOR

Subscribed and sworn to before me this 19th day of June, 1962.

THEODORE R. HARDEMAN
Theodore R. Hardeman
Notary Public

JOHN J. ABT
John J. Abt,
320 Broadway,
New York 7, N. Y.

JOSEPH FORER
Joseph Forer,
711 14th Street, N. W.
Washington 5, D.C.

Attorneys for Respondent.

Recommended Decision

(Filed Dec. 31, 1962)

PRELIMINARY STATEMENT

This is a proceeding on petition of the Attorney General, filed May 31, 1962, for an order of the Board requiring the respondent, Roscoe Quincy Proctor, to register and file a registration statement with the Attorney General as required of members of a Communist-action organization by section 8(a) and (c) of the Subversive Activities Control Act of 1950, as amended.¹ Pertinent parts of the Act are set forth in Appendix "A" attached and made a part hereof.

The petition alleged that Proctor was at the time of filing of the petition and at least since 1959 had been a member of the Communist Party of the United States of America;² that on October 20, 1961, an order of this Board became final requiring said Communist Party to register under section 7 of the Act as a Communist-action organization; and, that by reason of the failure of the Communist Party or any officer thereof to register and file a registration statement as prescribed in the Act, it became the duty of Proctor himself to register which he failed to do and continues to fail to do. In support of the petition, the Attorney General set forth, in paragraphs numbered "I" through "IV", allegations of facts relating to the membership of respondent in the Communist Party, includ-

¹ At the time of filing the instant petition, the Attorney General also filed similar petitions against nine other individuals. Each of the nine individuals was represented by the same counsel, attorneys John J. Abt and Joseph Forer, who represented the respondent in this proceeding. Virtually identical answers were filed by each respondent. Ann Fagan Ginger and Richard Bancroft also entered their appearances on behalf of the instant respondent at the hearing of evidence herein (tr. 32).

² For convenience the Communist Party of the United States of America will sometimes be referred to herein as "the Communist Party" or "the Party."

ing his attendance at meetings restricted to members of the Party, his election to membership on the National Committee of the Party, his serving as a member of the District Committee of the Northern District of California of the Communist Party, his discussions of Communist Party policy with other members of the Party, and his being called upon for service in behalf of the Communist Party.

Respondent, on June 25, 1962, filed an answer to the petition attacking the constitutionality of sections 8 and 13 of the Act; stating that the petition fails to allege facts warranting issuance of the order prayed for; denying the allegation that the Communist Party of the United States of America is a Communist-action organization; and relying upon the privilege against self-incrimination in refusing to answer the allegation that respondent was and continues to be a member of the Communist Party and the allegations of paragraph I to IV, inclusive, of the petition.

Pursuant to Rule 201.7(a) revised, of the Board's Rules of Procedure, the reliance in respondent's answer to the petition upon the constitutional privilege against self-incrimination operates as a denial for purposes of the Board proceeding.

A consolidated prehearing conference was held by the Board on July 2, 1962, in six other similar cases. Two of the attorneys for the present respondent also served as counsel for the respondents in the other cases. At the conference, counsel for respondent requested that the hearing herein not begin until a later date, and that it be held in California (tr. 25-29; Order of the Board dated September 28, 1962). Counsel for petitioner had no objections (tr. 27-28). It was agreed that there was no need for a prehearing conference in this proceeding since the principal areas had been covered in the aforesaid conference (tr. 28-29). Accordingly, the transcript of the prehearing conference of July 2, 1962, will be made a part of the record in this

proceeding, constituting transcript pages 1 through 30. The hearing herein was held on November 19, 1962, in San Francisco, California, before the undersigned Member of the Board.

Counsel for petitioner presented the oral testimony of two witnesses and two exhibits (Attorney General's Exhibits 1 and 2). No witnesses were presented on behalf of respondent, nor were any exhibits identified or offered (tr. 107). Counsel for petitioner made a brief closing argument (tr. 107-108). Counsel for respondent made no closing argument stating that the record speaks for itself (tr. 108).

Petitioner, on November 26, 1962, filed and served proposed findings of fact consisting of forty-two numbered paragraphs. Respondent's proposed findings of fact, filed on December 3, 1962, were as follows in proposing the conclusion that the petition should be denied:

1. The petitioner has offered no evidence in support of the allegation in the petition that the Communist party of the United States is a Communist-action organization.

2. The evidence introduced by petitioner, even if fully credited, would not establish by a preponderance of the evidence that the respondent is a member of the Communist Party of the United States within the meaning of the term "member" in the Subversive Activities Control Act.

The proposed findings submitted by both sides have been considered in making findings and conclusions herein.

The witnesses who gave oral testimony on behalf of petitioner were as follows:

Mrs. Lulu Mae Thompson, a housewife of Lathrop, California, joined the Communist Party in June of 1953 and ceased membership on March 30, 1962 (tr. 46, 70-71, 77).

While a member of the Communist Party she was secretary-treasurer of the Communist Party's San Joaquin County Club, chairman of the Sacramento-San Joaquin Valley Section of the Party, member of the Party District Committee of Northern California, and a delegate to the 17th National Convention of the Party (tr. 46). During her membership in the Communist Party, Mrs. Thompson reported its activities to the Federal Bureau of Investigation (tr. 46).

Howard Thompson, of Lathrop, California, and husband of Lulu Mae Thompson, joined the Communist Party in March 1948, was suspended from membership from May 1951 to October 1952 and ceased attending Party meetings in March 1962 (tr. 65, 80, 93-96, 106). While a member of the Communist Party, he was elected a delegate to the Sacramento-San Joaquin Valley Section in 1957 (tr. 81). In 1958 he was elected chairman of the San Joaquin County Club, and was later elected a delegate to the Agricultural Workers Commission of the Party (tr. 81). During his membership in the Party, he reported its activities to the Federal Bureau of Investigation (tr. 80-81).

Petitioner's witnesses Lulu Mae Thompson and her husband, Howard Thompson, were paid informants for the Federal Bureau of Investigation during and after their respective membership in the Communist Party. (E.g. tr. 46, 64, 77-78, 80-81, 99). In addition, Lulu Mae Thompson was paid for reporting activities prior to her joining of the Party (tr. 66, 77, 94, 99). While reporting to the F.B.I. on the activities of the Party, the Thompsons received money from the F.B.I. for both services and expenses.³

³ The witness Lulu Mae Thompson received around \$25.00 a month when she first started reporting and this was increased to \$50.00, then to \$75.00 (tr. 66-67, 77). Since her cessation of Party membership in March 1962, the witness received \$130.00 per month for some months and at the time of this hearing was receiving \$100.00 per month (tr. 77). Witness Howard Thompson received \$25.00 a month when he first began reporting in 1948 (tr. 99). During his fourteen years of reporting to the F.B.I. the witness Howard Thompson received total payments of approximately \$20,000.00 (tr. 80, 94, 99).

Full opportunity for cross-examination of these witnesses was afforded and pertinent copies of their prior reports to the F.B.I. were delivered to counsel for respondent for use in cross-examination. The cross-examination was directed mainly to items, such as money received from the F.B.I., going to possible interest of the witnesses.

There was no rebuttal of any of the testimony given by petitioner's witnesses and their testimony was mutually consistent and corroborative. Respondent's proposed findings did not raise specific matters going to the credibility of either of the witnesses. The Hearing Member, having observed the witnesses and considered the entire record, credits each of them.

Production of Reports of Petitioner's Witnesses

At the conclusion of the direct examination of petitioner's witnesses Lulu Mae Thompson and Howard Thompson, there were delivered directly to counsel for respondent by counsel for petitioner the receipts that each witness had signed for money received from the F.B.I., and the prior written reports made by each witness to the F.B.I. which counsel for petitioner considered to be statements within the purview of Title 18 U.S.C. Sec. 3500.⁴ At the same time there were delivered to the Hearing Member for *in camera* examination other documents representing information furnished to the F.B.I. by each witness. These documents were in two categories: (a) reports prepared by the witness, which petitioner's counsel conceded to be statements but considered not to contain any material which related to the subject matter of the witness' testimony, and (b) reports prepared by agents of the F.B.I. following oral interviews with the witness, which petitioner's counsel considered not to contain related matter within Title 18 U.S.C. Sec. 3500. (Sec. tr. 61, 87-88.)

⁴ Lists of reports turned over directly to counsel for respondent as to Lulu Mae Thompson appear at transcript pages 63-64; and those as to Howard Thompson at transcript pages 88-89.

These documents, numbering in the many hundreds, were examined by the Hearing Member *in camera*. One of the documents of the witness Lulu Mae Thompson was determined to relate to the subject matter of her testimony, and this was delivered to respondent's counsel (tr. 90). None of the other documents of either witness were determined to contain material relating to the subject matter of the witness's testimony (tr. 90). It was therefore unnecessary with respect to the category of documents in the form of memoranda prepared by agents of the F.B.I. on oral information furnished by the witnesses to determine whether the agents' memoranda qualified as statements of the witnesses under Title 18 U.S.C. § 3500 (tr. 90).

In addition to the above categories of documents, counsel for petitioner delivered to the Hearing Member one document common to the witnesses Lulu Mae Thompson and Howard Thompson, and one document of the witness Lulu Mae Thompson, from each of which excisions of unrelated portions were requested (tr. 61-62; 91-92). Appropriate excisions were made by the Hearing Member and the documents thereupon turned over to counsel for respondent (tr. 64, 91).

Counsel for respondent noted an objection to the Hearing Member's rulings with respect to the witnesses' documents (tr. 91). The objections were thereupon made Board exhibits, sealed, as follows: the Lulu Mae Thompson documents, "Proctor case—Board Exhibit 1—Lulu Mae Thompson"; and the Howard Thompson documents, "Proctor case—Board Exhibit 2—Howard Thompson" (tr. 90-91).

THE ISSUES

The primary issue in this proceeding is whether the respondent, Roscoe Quincy Proctor, is (or at the times mentioned in the petition, was) a member of the Communist Party of the United States of America. Another issue, raised by counsel for respondent, is whether the Commu-

nist Party of the United States is a Communist-action organization. (See Respondent's Proposed Finding No. 1.)

With respect to the matter of the Communist Party, counsel for petitioner, during the hearing, requested the Hearing Member to take official notice for the purpose of this proceeding of an order which the Board entered and of subsequent proceedings in the matter of the Communist Party of the United States of America (tr. 34-35). Counsel for respondent objected to such official notice on the grounds that respondent Proctor was not a party to the proceedings involving the Communist Party and was not bound by those proceedings and hence they are not competent with respect to him in this proceedings (tr. 36).

Upon consideration of an identical request for official notice in the Albertson case where similar objections were made, the unanimous Board stated as follows (Attorney General v. Albertson, Report and Order of the Board, dated October 29, 1962, pp. 7-8):

The clear intent of the Act is that once an order of this Board has become "final" requiring an organization to register as a Communist-action organization, the issue whether the organization is of such type is not to be relitigated in subsequent proceedings for the registration of a member of the organization. The Act provides for the registration of any member of an organization concerning which "there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization." (Section 8(a).) Thus an "issue" in a proceeding for the registration of an individual member is whether there is in effect a final order requiring the registration of the organization to which the individual is alleged to belong.⁸ Counsel for respondent did not, and could not dispute the fact that

⁸ The Act provides full opportunity for an organization that has been determined to be a Communist-action organization to obtain subsequent relief from the registration requirements by proper showing that it is not then a Communist-action organization. Section 13(b) and (1)(1).

there is in effect a final order of the Board requiring the Communist Party, U. S. A., to register as a Communist-action organization. (See the facts set forth below under the subheading "Official Notice.")

It would be a plainly unreasonable application of the Act to require that in a proceeding involving an individual, if shown to be a member of the Party and thus fairly represented in the Party proceeding, the status of the Party must nonetheless be relitigated.⁹ To do so would frustrate the purpose of the Act to obtain disclosure of the members of a Communist-action organization.

⁹ The Board, in the proceeding involving the Communist Party, on the basis of a record comprising over 14,000 pages of oral testimony and hundreds of exhibits, in which the Party was represented by competent counsel, determined the Party to be a Communist-action organization as defined in the Act.

FINDINGS OF FACT

1. *Official Notice*

Respondent's objection to the taking of official notice was overruled and pursuant to Board precedent in the Albertson case, official notice is taken of the following, which are hereby deemed to be facts for the purposes of this proceeding. (See tr. 36-40.) No evidence was offered by respondent to rebut these facts:

1. The Subversive Activities Control Board on April 20, 1953, entered an order requiring the Communist Party of the United States of America to register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950;

2. The United States Court of Appeals for the District of Columbia Circuit on July 30, 1959, entered its judgment in *Communist Party of the United States of America v. Subversive Activities Control Board*, which affirmed the order of the Board requiring the Communist Party of the United States of America to register as a Communist-action organization;

3. The Supreme Court of the United States on October 10, 1961, entered its mandate which affirmed the judgment of the United States Court of Appeals for the District of Columbia Circuit, which judgment had been entered by the said United States Court of Appeals on July 30, 1959, in *Communist Party of the United States v. Subversive Activities Control Board*;

4. More than ten (10) days have elapsed since the Supreme Court entered its mandate on October 10, 1961, in *Communist Party of the United States of America v. Subversive Activities Control Board*, No. 12, October Term, 1960;

5. There was published in the Federal Register for October 21, 1961, Volume 26, No. 204, at page 9923, a notice by the Subversive Activities Control Board of the fact that the order of the Board requiring the Communist Party of the United States of America to register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950 became final on the 20th day of October 1961; and

6. More than sixty (60) days have elapsed since October 20, 1961.

It was stipulated by counsel and the Hearing Member finds: that the Communist Party of the United States of America has not registered with the Attorney General nor filed a registration statement pursuant to section 7 of the Act; that no officer of the Communist Party nor any authorized representative of the Party has registered for and on behalf of the organization pursuant to section 7(h) of the Act; and, that the respondent, Roscoe Quincy Proctor, has not registered or filed a registration statement with the Attorney General pursuant to section 8(a) and (c) of the Act (tr. 33-34, 36).

2. Evidence of Party Membership of Respondent

Petitioner's witnesses Lulu Mae Thompson and Howard Thompson identified the respondent, Roscoe Quincy Proctor, by pointing him out as present in the hearing room, seated at counsel table (tr. 47, 81, 72-73). The Thompsons testified to meetings of specific, constituent, organizational parts of the Communist Party of the United States of America which the witnesses attended and at which Proctor was among those present and participated. Proctor did not take the stand to deny or explain the evidence furnished by petitioner's witnesses and no witnesses were presented by respondent to rebut or contradict that evidence. Findings based upon the testimony of these witnesses will now be made.

a. Testimony of Lulu Mae Thompson

In November 1959, the witness Lulu Mae Thompson attended the first session of the Convention of the Communist Party of Northern California held in Oakland, California (tr. 47).⁵ There were discussions of various topics in preparation for the 17th National Convention of the Communist Party and the election of delegates to the National Convention took place (tr. 47). The respondent Proctor and the witness Lulu Mae Thompson were among those elected delegates to the National Convention (tr. 48).

The witness attended all sessions of the National Convention of the Party held in December 1959 in New York City (tr. 48). Proctor was present at the sessions of the National Convention (tr. 48). He represented the Northern California delegation on the Negro Commission and was also appointed as one of a committee of three to visit William Z. Foster, the chairman emeritus of the Communist Party, who was unable to attend the convention because of illness (tr. 48).

⁵ The respondent Proctor was present at this and at all subsequent meetings testified to by the witness Lulu Mae Thompson.

During the convention the respondent and the witness attended a caucus of the Northern California delegation which had been called for the purpose of selecting nominees to represent Northern California on the National Committee (tr. 48-49). Proctor was nominated and accepted the nomination (tr. 49).

The National Convention adopted certain recommended changes in the Constitution of the Communist Party, U. S. A. (tr. 51-52). Under the Constitution, as amended, only members of the Party who had been in good standing for at least five years were eligible for election to the National Committee, and to be eligible for election as a State officer or member of the State Committee a member had to be in good standing for at least two years (A.G. Ex. 1, pp. 10 and 15, and A.G. Ex. 2). The witness is without knowledge of any changes in the Constitution from December 1959 until March 1962 when she left the Party (tr. 52-53).

During the last session of the National Convention, election of National Committee members was held (tr. 49). The chairman of each delegation went to the rostrum where he received the ballots from the Elections Committee. He then returned to his delegation and distributed the ballots. After the delegates marked them, the delegation chairman collected them and returned them to the Elections Committee which retired from the room to count them. The Elections Committee later returned and announced the results of the election (tr. 49). The witness recalled the name of Roscoe Proctor being read as one of those elected to the National Committee of the Party (tr. 49-50).

Following the announcement of the Elections Committee, the convention itself was adjourned, and the delegates who had not been elected to the National Committee retired from the convention hall (tr. 50). The newly elected National Committee then went into session (tr. 50). Later, Proctor and another member of the National Committee

from Northern California, went to Mrs. Thompson's room and reported the results of the meeting of the new National Committee, including the names of those elected national officers (tr. 50). To the witness' knowledge, there has been no National Convention of the Communist Party from December 1959 until she left the Party in March 1962 (tr. 50).

In February 1960, the witness attended the second session of the Northern California District Convention of the Communist Party held in Oakland, California, at which there were reports on the National Convention as well as reports from several of the Commissions (tr. 53-54). At this District Convention, elections were held as a result of which Proctor was elected, and the witness Lulu Mae Thompson reelected, to membership on the Northern California District Committee of the Party (tr. 54).

In February 1961, the respondent and the witness were present at a meeting of the District Committee of the Communist Party of Northern California held in San Francisco (tr. 54-55). At this meeting Proctor reported on his attendance at a Communist Party school which he had attended in New York City (tr. 55). Among the many subjects he had studied while there were historical materialism, the class struggle, and "the 81 party conference statement." (Tr. 55.) It was announced at this meeting that Proctor had been given responsibility for the peace work of the outlying counties of the Communist Party in Northern California (tr. 55).

At an April 1961 meeting of the District Committee of the Party held in San Francisco, Proctor reported to the committee on the recent San Francisco peace demonstrations, saying they had been among the largest in the nation and had had youth and Negro participants (tr. 55-56).

A Communist Party Northern California District Committee meeting was held at the home of the chairman of the Northern California District in August 1961 (tr. 54,

56). Proctor reported on the Citizens Committee for Constitutional Liberties (tr. 56). According to Proctor the present purpose of the Committee is to disseminate propaganda, but in the event arrests were made in the Party, it would become a defense committee (tr. 56). The chairman of the Party's Northern California District asked Proctor to take the chairman's place while he was on vacation (tr. 54, 56).

The Party's District Committee of Northern California met in September 1961 in San Francisco (tr. 56-57). Proctor again reported on the Citizens Committee for Constitutional Liberties (tr. 57). He stated that the Citizens Committee had representation of Party and non-Party people, and that the District Board of the Communist Party of Northern California was to meet and establish policies for the Communist Party members working in this committee (tr. 57).

In January 1962, the representatives of the outlying counties of the Communist Party of Northern California met at Proctor's home in Berkeley (tr. 57-58). The chairman of the Party's Northern California District announced that Proctor had been assigned "to ride herd" on the People's World fund campaign then in progress (tr. 54, 58). Proctor's report to the meeting included his recommendation that all Communists review Gus Hall's article in the August issue of Political Affairs (tr. 58). Proctor announced that Hall would be in the San Francisco Bay area later in January, and that many meetings were being arranged for him (tr. 58).

Proctor's home was the location for another meeting of representatives of the outlying counties of the Communist Party of Northern California in February 1962 (tr. 58). In his report on the visit of Gus Hall to the area, Proctor stated that Hall had addressed a meeting of all of the national leaders of the Party on the Pacific Coast and had recommended that the Party on the Pacific Coast hire a

youth director to work with youth along Communist Party lines (tr. 59).

In March 1962, the witness attended still another meeting of the representatives of the outlying counties of the Communist Party of Northern California (tr. 59). This, too, was held at Proctor's home (tr. 59). Proctor reported on weekly meetings of the Citizens Committee for Constitutional Liberties (tr. 59). He also stated that he had attended a meeting of the national leaders in Detroit on the previous weekend (tr. 60).

b. Testimony of Howard Thompson

In February 1961, the witness and Proctor, along with other "comrades," drove together and attended a meeting of the Sacramento-San Joaquin Valley Section of the Communist Party of Northern California (tr. 86).

In March 1961, and in the latter part of June 1961, the witness attended meetings of the District Committee⁶ of the Communist Party of Northern California held in San Francisco at which respondent was present (tr. 82, 86).⁷ At a meeting of the same District Committee in August 1961, Proctor gave a report on the organization of a citizens committee to resist the Supreme Court decision and which was later to become a defense committee (tr. 83). The District Committee assigned themselves a quota of \$3500 to finance the citizens committee (tr. 83). It was also announced at this meeting that Proctor would be in charge of the District Board of the Communist Party of Northern California during Micky Lima's absence on vacation (tr. 83). The District Committee voted to concur with the

⁶ The witness was not a member of the District Committee but attended District Committee meetings as an observer (tr. 92-93). The witness did not attend the March 1961 meeting in full (tr. 93).

⁷ Respondent was present at this and at all meetings to which the witness Howard Thompson testified to herein.

actions of the National Committee in delegating power to the National Executive Committee (tr. 83).

At a Communist Party meeting of the District Committee members from the outlying counties, held at Proctor's home in February 1962, the respondent reported that Gus Hall had been in the area, had given reports on the expulsions in New York, and had suggested that a full-time person be delegated for youth work (tr. 84-85). Proctor further reported that the National Committee members of the West Coast had held a meeting, and that the Party would carry on its work to organize the committees to combat the effects of the Supreme Court decision (tr. 84-85).

CONCLUSIONS

The facts show that the respondent, Roscoe Quincy Proctor, was duly nominated and elected a member of the high ranking National Committee of the Communist Party of the United States of America, and thereafter participated in the meetings of the committee. He was also elected, in February 1960, a member of the Northern California District Committee of the Party, and was shown to have been serving as such in February of 1962, a few months before the Attorney General filed his petition instituting this proceeding. Under the Communist Party's Constitution, eligibility for these positions required membership in good standing in the Party for five years for the National Committee and two years for the District Committee.

Proctor was given responsibility for certain work of the Party in Northern California and thereafter reported to Party groups on the progress of the work. In February 1961, Proctor reported to the District Committee of the Party in Northern California on a Communist Party school he had attended in New York City. It was shown that on three occasions in the year 1962, representatives from vari-

ous Party localities met with Proctor at his home to conduct Party business. At one of these meetings Proctor stated that he had recently attended a meeting of the national leaders in Detroit. At a meeting of the Northern California District Committee of the Party in August 1961, it was announced that Proctor would be in charge of the District Board while the chairman was on vacation.

The facts that have been found herein, some of which are summarized above, were established by uncontroverted evidence presented by two witnesses one or both of whom were present as members of the Communist Party at the meetings in which Proctor participated. The witness Lulu Mae Thompson was a member at the same time as Proctor of the Northern California District Committee of the Party.

The evidence of record clearly establishes that the respondent, Proctor, by both his words and actions, had and continues to have the desire and intent to be a member of the Communist Party, and that the Party has and continues to recognize and consider him to be a member. It is found and determined that the evidence preponderates to establish that Proctor is, and since at least the close of the year 1959 has been, a member of the Communist Party of the United States of America.

There is in effect, and has been since October 20, 1961, a final order of the Subversive Activities Control Board requiring the Communist Party, U. S. A., to register under the Subversive Activities Control Act as a Communist-action organization. The respondent, Roscoe Quincy Proctor, who has not registered under section 8 of the Subversive Activities Control Act, is in fact required to register under such section.

RECOMMENDATION

It is recommended that the Board issue an appropriate order requiring the respondent, Roscoe Quincy Proctor, to register under and pursuant to section 8(a) and (c) of the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization.

(signed) FRANCIS A. CHERRY
Francis A. Cherry
Hearing Member

December 31, 1962
Washington, D. C.

Report of the Board

(Filed Jan. 18, 1963)

The Hearing Member, by Recommended Decision issued December 31, 1962, recommended, on the basis of detailed findings of fact, that the Board issue an order requiring respondent, Roscoe Quincy Proctor, to register under and pursuant to section 8(a) and (c) of the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization.

Exceptions to the Recommended Decision were filed on January 9, 1963, on behalf of respondent. Neither party requested oral argument and such argument is unnecessary.

Respondent's exception 1 renews, and thereby preserves, objection to the entry of a registration order on the ground that the entry of such an order would violate certain rights and privileges under the Constitution of the United States. The Board, as an agency created by Congress, does not pass on the constitutionality of the Act under which the Board functions. Under section 14 of the Act, respondent has the right to judicial review of a registration order and

in that review may obtain determination by the courts of the contentions as to the constitutionality of the Act.

By exception 2 respondent attacks, in general, the sufficiency of the evidence to establish that respondent is a member of the Communist Party within the meaning of the Subversive Activities Control Act. It is argued that the evidence was "irrelevant, remote, immaterial and incompetent." Exception 6 attacks the crediting of petitioner's witnesses, and asserts that their testimony was obtained and admitted in violation of the First and Fourth Amendments.

The subsidiary facts from which the Hearing Member arrived at the finding of membership of respondent in the Communist Party were not controverted and, except for the broad, overall assertions in respondent's exceptions, are not disputed. These facts, which are set forth in detail at pages 9 to 14 of the Recommended Decision, and are summarized at pages 14 and 15 were based upon the personal knowledge and experiences of the witnesses. Unless the testimony of the witnesses is to be completely disregarded, the evidence shows respondent's election to official positions in the Communist Party, his admission to and participation in the councils of the organization, and his having been assigned duties and responsibilities in connection with the work of the Communist Party. These facts are strong and convincing evidence of membership. They clearly establish a mutual agreement and intention on the part of the Party and the respondent that respondent is and has been a member. The assertions that the facts are irrelevant, immaterial and incompetent are rejected.

The Board has reviewed and considered the direct and cross-examination of petitioner's witnesses upon respondent's assertion "that none of them was worthy of credence." The exception does not say why it is asserted that the witnesses should not be credited. The Hearing Member observed the witnesses and accepted them. Each was

an informant for the Federal Bureau of Investigation and acting as such during the periods of membership in the Communist Party about which the testimony was given. As pointed out by the Hearing Member, the testimony was mutually consistent. There was full opportunity for cross-examination of the witnesses and full opportunity was also afforded for the presentation of rebuttal testimony. The Board does not find any basis in the record for respondent's blanket attack upon the credibility of the witnesses. The fact that the witnesses testified to the operations and activities which they were paid to observe does not render their testimony inadmissible under the First and Fourth Amendments.

Respondent's exception 3 raises the question as to the time membership must be found, and the grounds and reasons therefor. The Hearing Member in his Recommended Decision concluded that respondent "is, and since at least the close of the year 1959 has been, a member of the Communist Party of the United States of America." (Recommended Decision, page 15.) Consideration of the record as a whole fully supports this finding. The evidence shows a continuing recognition by the Party of respondent as a member from a time prior to his nomination and election to the National Committee in December of 1959 up to at least a few months before the Attorney General's petition was filed. The record also gives many facts evidencing respondent's intention to be a member continuously throughout these years, such as meetings he held at his home to discuss Party business with other members of the Party, and his steady attendance at meetings of Party organizational components. While no one fact standing alone establishes membership at a particular time, the composite of the facts convinces the Board that respondent is and has been a member of the Communist Party.

Respondent's exceptions 4 and 5, regarding the treating of the Communist Party of the United States of America as

a Communist-action organization and the taking of official notice of certain facts with respect to the Board's order requiring registration of the Communist Party pursuant to the provisions of the Act, are rejected. The reasons are set forth in the Report and Order of the Board in Attorney General, Petitioner v. William Albertson, Respondent, Board Docket No. I-1-62, and are quoted at pages 7 and 8 of the Recommended Decision herein.

Respondent, in exception 7, contends that all of the reports made by petitioner's witnesses to the F.B.I. should have been produced to the respondent, and that excisions should not have been made from any of the reports which were produced. The Board has itself examined all of the documents. The Board is satisfied that there were turned over to respondent all of the documents which related to the subject matters about which the witnesses testified. (See Recommended Decision, pages 5 and 6.) The few excisions were of clearly unrelated matter and were proper. Since all reports containing information relating to the testimony given by the witnesses were in fact produced and since respondent is not entitled to conduct a fishing expedition through unrelated, irrelevant documents, the exception is without merit.

Respondent's exception 8 is as follow:

Respondent excepts to the failure to find that all the alleged activities of respondent testified to were constitutionally protected, relating solely to discussion of problems of Negroes (Tr. 48, 54), youth (Tr. 59-85), peace (Tr. 55-56), constitutional liberties (Tr. 56, 57, 59, 83), agricultural workers (Tr. 81), speakers (Tr. 58, 84), and customary organizational activities (elections, Tr. 49-51; fund raising, Tr. 83; literature, Tr. 58).

The basic facts testified to in this proceeding were Proctor's election to certain official positions in the Communist Party and numerous meetings at which the wit-

nesses stated he was present and participated and which were described as Communist Party meetings. Among the activities of Proctor at Communist Party meetings were reporting on matters in which the Party had an interest or connection. The "activities" were admissible to show the nature of the meetings and Proctor's familiarity with and participation in the business of the Communist Party.¹ Determination whether the matters of Party business in which Proctor was shown to have been active were "constitutionally protected" is not an issue in this proceeding. Proctor's activities are merely relevant items of evidence in determining whether he is a member of the Communist Party. Membership is the fact to be determined. Assuming arguendo that the evidence of membership consists of constitutionally protected conduct, this does not make the evidence inadmissible to establish membership.

Respondent's exception 9 is to the effect that the two witnesses, Lulu Mae and Howard Thompson, cannot be said to have been present at meetings of the Communist Party as members because they "were present as paid spies and were not members within the meaning of the Communist Party Constitution of 1957, as amended in 1959."² The testimony of the witnesses that they were members of the Party and their testimony showing that

¹ For instance, during Proctor's presence at a meeting of the District Committee of the Communist Party of Northern California it was announced that he had been given responsibility for the Party's "peace work" of the outlying counties (tr. 55; Recommended Decision, page 11). He was shown to have reported to subsequent meetings of the District Committee on a peace demonstration and on the Citizens Committee for Constitutional Liberties (tr. 55-56; Recommended Decision, page 12). At another District Committee meeting where he reported on the Citizens Committee he stated that the District Board of the Party was to meet and establish policies for the Party members working in this committee (tr. 57; Recommended Decision, page 12).

² The reliance on the Communist Party Constitution, although not supported by any record citation, is taken as referring to Attorney General's Exhibits 1 and 2 which constitute the constitution as amended at the 1959 National Convention of the Party, and are the only evidence of record giving the provisions of the Constitution.

they were accepted as members by the Party was not controverted.³ There was no evidence that they had been expelled under the provisions of the Party constitution. The cases are numerous in which the courts have accepted person acting as informants for the F.B.I. during their membership in the Communist Party.

In number 10, respondent excepts to the failure to find the total payments of approximately \$17,956 to the witness Lulu Mae Thompson. The Hearing Member considered the fact that the witness was paid for reporting activities prior to her joining the Communist Party and during and after her membership (Recommended Decision, page 4). Increases in monthly payments which she received were noted by the Hearing Member. The witness was asked on cross-examination if she had received \$17,956.65 in expenses for her services from the F.B.I. over the period from early 1951 to the present, and the witness replied that, "it is possible" (tr. 64-70). The record is inconclusive on the exact total of the payments. The testimony as to the possibility of the total is noted. The exception is without merit.

Respondent's final exception, number 11, is to the statement adopted by the Hearing Member that the purpose of the Act is to obtain disclosure of the members of a Communist-action organization. Respondent states that, "the terms, legislative history and litigation under the Act make it clear that the Act's purpose is to harass members of the Communist Party and other organizations in disfavor with the government and to interfere with their constitutionally-protected activities." Suffice it to say that respondent's malediction of the Congressional purpose is unwarranted from the very "terms, legislative history and litigation" relied upon. The exception is rejected.

³ During an early period of his membership in the Party, the witness Howard Thompson was suspended but thereafter fully accepted as an active member (tr. 81, 80, 94).

Upon consideration of the record, the Recommended Decision, and the exceptions thereto, the Board finds that the Recommended Decision should be and the same is hereby adopted as the findings and conclusions of the Board.

The Board finds and determines from the preponderance of the evidence that the respondent, Roscoe Quincy Proctor, is a member of the Communist Party of the United States of America, a Communist-action organization. There is in effect and has been since October 20, 1961, a final order of the Board requiring the Communist Party to register under section 7(a) of the Act as a Communist-action organization, more than thirty days have elapsed since such order became final, and such organization is not registered. The respondent, Roscoe Quincy Proctor, who has not registered or filed a registration statement with the Attorney General pursuant to section 8(a) and (c) of the Act is in fact required to do so.

Accordingly, an order requiring the respondent to register under section 8 of the Act accompanies this Report of the Board.

By the Board:

(signed) FRANCIS A. CHERRY, *Member*
Francis A. Cherry

(signed) THOMAS J. DONEGAN, *Member*
Thomas J. Donegan

(signed) JAMES R. DUNCAN, *Member*
James R. Duncan

(signed) EDWARD C. SWEENEY, *Member*
Edward C. Sweeney

_____, *Vacancy*

January 18, 1963
Washington, D. C.

Registration Order

(Filed Jan. 18, 1963)

The Board, after appropriate hearing, having this day issued a report in writing in which it states its findings as to the facts and its conclusion that the respondent, Roscoe Quincy Proctor, is required to register under the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization as defined in the Act, it is

ORDERED that the respondent, Roscoe Quincy Proctor, shall register under and pursuant to section 8(a) and (c) of the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization, and it is

FURTHER ORDERED that a copy of this REGISTRATION ORDER be served upon the respondent, Roscoe Quincy Proctor.

By the Board:

(signed) FRANCIS A. CHERRY, *Member*
Francis A. Cherry

(signed) THOMAS J. DONEGAN, *Member*
Thomas J. Donegan

(signed) JAMES R. DUNCAN, *Member*
James R. Duncan

(signed) EDWARD C. SWEENEY, *Member*
Edward C. Sweeney

_____, *Vacancy*

January 18, 1963
Washington, D. C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,623

ROSCOE QUINCY PROCTOR, *Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent*

Petition for Review

(Filed Feb. 14, 1963)

Roscoe Quincy Proctor, by his attorneys, petitions the Court to review and set aside the order of the Subversive Activities Control Board (hereafter called the Board) issued January 18, 1963, in the proceeding before the Board entitled Robert F. Kennedy, Attorney General of the United States, *Petitioner v. Roscoe Quincy Proctor, Respondent*, Docket No. I-10-62.

NATURE OF THE PROCEEDINGS

The order involved herein was issued under section 13(g)(2) of the Subversive Activities Control Act of 1950 (hereafter called the Act), 50 U.S. Code § 792(g)(2). It requires the petitioner herein to register under section 8(a) and (c) of the Act, 50 U.S. Code § 787(a) and (c), "as a member of the Communist Party of the United States of America, a Communist-action organization." The order was issued after proceedings before the Board initiated under section 13(a) of the Act, 50 U.S. Code § 792(a), by a petition of the Attorney General alleging that petitioner was a member of the Communist Party of the United States of America and that neither he nor that organization had registered under the Act.

JURISDICTION AND VENUE

Jurisdiction and venue exist in this Court by virtue of section 14(a) of the Act, 50 U.S. Code § 793(a), which so far as is pertinent provides:

"The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, . . . may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside."

GROUND FOR RELIEF

1. Sections 8 and 13 of the Act, on their face and as applied, are unconstitutional. They violate the Fifth Amendment privilege against self-incrimination, which petitioner hereby asserts, and the First Amendment; deny petitioner due process of law, a judicial trial and trial by jury, contrary to the Fifth and Sixth Amendments, Art. III, § 1 and § 2, cl. 3; and constitute a bill of attainder.
2. The findings and order of the Board are based on erroneous constructions of the Act.
3. The findings and order of the Board are not supported by a preponderance of the evidence.
4. The findings and order of the Board are based on irrelevant evidence.
5. The Report of the Board fails to define adequately the grounds and reasoning of the order.
6. The Board erred in holding that petitioner was bound by the Board's prior determination that the Communist Party was a Communist-action organization.

RELIEF PRAYED

Wherefore, petitioner prays that the Court set aside the aforesaid order of the Board.

Respectfully submitted,

s/ **JOHN J. ABT**
John J. Abt
320 Broadway
New York 7, N. Y.

s/ **JOSEPH FORER**
Joseph Forer
711 14th St. N. W.
Washington 5, D. C.

Attorneys for Petitioner

[fol. 62]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 17,492

WILLIAM ALBERTSON, Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

No. 17,623

ROSCOE QUINCY PROCTOR, Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

On Petitions for Review of Orders of the Subversive Activities Control Board.

Messrs. John J. Abt, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, and *Joseph Forer*, for petitioners.

[fol. 63] *Mr. Kevin T. Maroney*, Attorney, Department of Justice, with whom *Assistant Attorney General J. Walter Yeagley*, *Messrs. Frank R. Hunter, Jr.*, General Counsel, Subversive Activities Control Board, and *George B. Searls* and *Mrs. Lee B. Anderson*, Attorneys, Department of Justice, were on the brief, for respondent. *Mr. Peter Paul Hanagan*, Attorney, Subversive Activities Control Board, also entered an appearance for respondent.

Mr. Leonard B. Boudin filed a brief in No. 17,623 on behalf of National Lawyers Guild, as *amicus curiae*, urging reversal.

[File endorsement omitted]

OPINION—Decided April 23, 1964

Before Bazelon, *Chief Judge*, and Bastian and McGowan, *Circuit Judges*.

McGOWAN, *Circuit Judge*: These are proceedings for review, pursuant to § 14a of the Subversive Activities Control Act (50 U.S.C. § 781 *et seq.*), of two separate orders of the Subversive Activities Control Board requiring petitioners, Albertson and Proctor, to register under Section 8 of the Act as members of "the Communist Party of the United States of America, a Communist-action organization." Petitioners do not claim any deviation by the Board from the prescribed statutory procedure; nor do they assert that the orders are not supported by adequate evidence. Rather, they attack the orders on the ground that the underlying statutory provisions are, for various reasons, unconstitutional.

These claims of constitutional infirmity fall into two groups. The first is compounded of arguments which import that the orders are invalid because of certain consequences which might flow from failure to comply with them. We do not consider these questions ripe, as yet, for judicial consideration. The second group is addressed to the proposition that the bare existence of orders, without more, impairs petitioners' constitutional rights. As to these grounds, we affirm the Board's action.

[fol. 64]

I

The scheme of the statute involved in these cases is that, if a Communist-action organization fails to register as required by an order of the Board (issued pursuant to Sections 7 and 13 of the Act) and thereby fails to disclose its membership, the members individually may be compelled to register as such.¹ This individual obligation

¹ Section 8 of the Act provides:

(a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final

attaches only after default by the organization, and only after the fact of membership has been found to exist in a proceeding before the Board initiated by the Attorney General against a particular person.² Registration itself [fol. 65] consists of filing a signed registration form identifying oneself as a member of the organization and giving one's address.³ The statute also provides that this act of

order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

² Section 13 of the Act provides:

(a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

• • •

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

• • •

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a) of this title, [sic] it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

³ Form IS-52a, Budget Bureau No. 43-R414 (Ed. 9-6-61).

registration is to be accompanied by the filing of a separate registration statement containing such information as the Attorney General may, by regulation, prescribe.⁴ Pursuant to this grant of authority, the Attorney General has called for such additional information as date and place of birth, *aliases* used during the past ten years, and all offices held in the organization presently or during the preceding twelve months, together with a description of the duties performed during any such tenures of office.⁵ Failure by an individual to comply with a Board [fol. 66] order requiring him to register is punishable by a fine of not more than \$10,000, or imprisonment for not more than five years, or both, with each day of non-compliance constituting a separate offense. These penalties follow upon conviction pursuant to the usual criminal processes established independently of the Act.

These proceedings were initiated by the Attorney General's representations to the Board that petitioners were members of the Communist Party of the United States; that that organization had theretofore been found by the Board to be a "Communist-action organization" and ordered to register under Section 7 of the Act; that such organization had not registered; and that, accordingly, the Board should order petitioners to register under Section 8. The answers filed by petitioners denied that the Communist Party was a "Communist-action organization"; refused, by reason of a claim of privilege against self-incrimination, to answer the allegations of petitioners' membership in the Party; and asserted the invalidity of Sections 8 and 13 of the Act on various constitutional

⁴ Section 8(c) of the Act provides:

The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall be regulations prescribe.

⁵ Form IS-52, Budget Bureau No. 43-R301.2.

grounds. After separate hearings at which the Attorney General adduced evidence and petitioners did not, the orders under review were issued.

II

Petitioners press strongly the contention that the membership registration provisions of the Act collide directly with their Fifth Amendment immunity against self-incrimination; and that, because of this conflict, the Board's orders should now be declared invalid. Congress has, they say, so legislated with respect to the Communist Party that membership therein has taken on direct and serious criminal connotations, creating dangers of such a nature as to relieve against any duty, however imposed, of self-revelation. The argument, in substance, is that there is no room within the Fifth Amendment for the simultaneous [fol. 67] operation of the contrasting legislative approaches of prohibition on pain of criminal punishment, on the one hand, and regulation through the publicity of compelled disclosure, on the other.

That the point is not without force is evident from the recent decision of this court in *Communist Party v. United States*, — U.S.App.D.C. —, — F.2d — (No. 17,583, decided Dec. 17, 1963). That was an appeal by the Communist Party of the United States from its conviction by a jury on an indictment for failing to register as a Communist-action organization, as required by a Board order issued pursuant to Sections 7 and 15 of the Act. We reversed and remanded for a new trial on the ground that, since the registration requirements involved action on behalf of the organization by an officer or authorized individual who would thereby identify himself with the Party, the self-incrimination shield of the Fifth Amendment placed the prosecution in a criminal trial under the necessity of proving, as an essential element of the crime charged, the availability to the defendant organization of an individual willing to effect the registration and to assume the concomitant risk of criminal exposure. There having been a defi-

ciency of proof in this respect, we set aside the Party's conviction but afforded the Government an opportunity to supply such proof in a new trial.

That case, however, presented us with an appeal from a criminal conviction for refusing to comply with a Board order, and not with a statutory review of the order itself. The latter proceeding, indeed, had already taken place, culminating in the Supreme Court's decision in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961), upholding the Board's order which found the Communist Party to be a "Communist-action organization" and which required it to register as such. In that review proceeding, the Party advanced many contentions with respect to the invalidity of the order and of the Act under which it was issued. Many of these were founded in the Constitution. None prevailed, and most were disposed of on the merits. A conspicuous exception in this latter respect was the self-incrimination attack upon the requirement that the Party register.

The Supreme Court explicitly refrained from passing upon the merits of this challenge because it was premature. *Communist Party v. SACB*, 367 U.S. 1,105-110 (1961). The Court pointed out that there were certain contingencies standing between the bare issuance of the order requiring registration and its enforcement as against a claim of the privilege. One was whether the privilege would in fact be claimed, and another was whether, if claimed, it would be honored. Over and above these matters, however, the Court also noted that any disallowance of a claim of the privilege in the context of this Act is likely to raise complex and difficult legal issues which can best be dealt with in the precise factual setting in which they finally arise. Questions of this nature, said the Court, are "questions which should not be discussed in advance of the necessity of deciding them"; and it went on to say that the point when that necessity exists, if ever, is "when enforcement proceedings for failure to register are instituted against the Party or against its officers."

We think the same reasoning extends to the registration requirements applicable to members of the Party. It is pressed upon us that, unlike the situation as it was before the Supreme Court, here the privilege has been claimed and denied. But the facts relied upon in support of this contention are, in respect of the claim, that the privilege was advanced in petitioners' answers to the Attorney General's petition to the Board initiating these proceedings; and that it was asserted again in the petition for review in this court. With respect to denial, this [fol. 69] is said to reside in the action of the Attorney General in continuing the proceedings before the Board in the face of the answers, the action of the Board in issuing the orders, and the action of the Attorney General, as the Board's lawyer, in defending the orders before this court.

But these circumstances were, of course, all present in the record before the Supreme Court in the *Communist Party* review proceeding, and do not, in and of themselves, offer any basis for differentiating this case from that in terms of prematurity. What is new since the earlier decision is the fact that the Attorney General did receive and reject a claim of privilege anonymously tendered on behalf of officers of the Party, and did move to have the Party indicted, tried and convicted in criminal proceedings for failure to comply with the registration order. It could presumably be urged upon us, although petitioners appear not to have done so in their papers, that this demonstrates beyond peradventure that any claim of privilege by petitioners as a justification for not registering will inexorably be followed by criminal prosecution, and that this court, anticipating that certainty, should go ahead now and decide the issues relating to the privilege.

It is to be remembered, however, that the criminal prosecution of the Party has thus far resulted in a judicial determination that the registration requirement of the Act, at least in the case of the Party and its officers, presents major problems in respect of the Fifth Amendment privi-

lege. It seems unlikely that these problems are without parallel in the case of mere members of the Party. In any event, it is by no means clear as of this moment, any more than it was at the time of the Supreme Court decision, that affirmance of the orders before us will inevitably result in the invocation of criminal processes *vis-a-vis* the petitioners for failure to register pursuant to a claim of [fol. 70] Fifth Amendment immunity. If denial of that claim in the future is pressed to the point of criminal prosecution, it remains true that, insofar as the protective reach of the Fifth Amendment is concerned, that proceeding "will provide an adequate forum for litigation of that issue." *Communist Party v. SACB*, 367 U.S. at 107. Apart from the natural apprehensions of petitioners with respect to the burdens of criminal prosecution, we believe it to be a better forum in the sense that legal issues can be resolved in the light of the peculiar factual setting in which they arise. Be this as it may, however, it is a forum which may never be reached, and we see no reason to anticipate decisions which may never have to be made.

Nor can we at this stage vacate the order on the ground that the statute is unconstitutional because it compels the production of potentially incriminating information while allowing "the exercise of the Fifth Amendment privilege only under circumstances which effectively nullify the Amendment's protection." *Communist Party v. SACB*, 367 U.S. at 109. See *Boyd v. United States*, 116 U.S. 616 (1886). Compare *Communist Party v. SACB*, 96 U.S.App.D.C. 66, 115-16, 223 F.2d 531, 580-81 (1954) (Bazelon, J., dissenting). Whether the Subversive Activities Control Act is such a statute may not be determined, as the Supreme Court said in 1961, until the question is raised in a criminal prosecution.*

* Two other contentions made by petitioners fall within the sweep of what we have said hereinabove about ripeness. One is that the Act deprives petitioners of their right to a jury trial. This rests upon a reading of the statute as making the administrative de-

[fol. 71]

III

We turn now to those issues which are presently ripe for review. The same arguments here advanced were, for the most part, raised in respect of the registration order directed to the Communist Party, and were rejected in the 1961 opinion of the Supreme Court. Though different considerations may perhaps arise when, as here, the contentions are made on behalf of individuals, as distinct from the organization of which they are members, we nevertheless consider that case to be largely determinative of the remaining issues urged upon us in this proceeding.

1. The petitioners first contend that the registration provisions violate the Due Process Clause "because they exact admissions which serve no governmental purpose." The Supreme Court, in the 1961 case, held that the Government had a legitimate interest in discovering and disclosing the identity of members of the Communist Party. [fol. 72] That conclusion obtains here as well. Section 8 operates only if the Party has not yet registered under Sec-

termination of the status of the Communist Party binding upon petitioners in a criminal prosecution for non-compliance with the Board's orders. This is, obviously, a question of statutory construction, with constitutional implications, to be raised and decided when, and if, a criminal trial occurs.

The second derives from the challenge made to the grant of authority, in Section 8(c) of the Act, to the Attorney General to formulate, by regulation, the information to be supplied as an incident to registration. This authority is said to be so broad in scope and so lacking in standards for its exercise as to encounter sundry insurmountable constitutional obstacles. There is no showing that the regulations which the Attorney General has promulgated exceed the bounds of Congress' likely intentions. Compare the provisions of § 7(d) of the Act (prescribing the information to be contained in registration statements filed by Communist-action and Communist-front organizations). Until there is such a showing, the propriety of the Attorney General's actions and the conditions under which Congress has permitted him to act can best be inquired into judicially in a specific criminal prosecution, if any is ever initiated—a setting of greater factual concreteness.

tion 7. It is, thus, an alternative method of achieving the Government's aim. Petitioners attempt to distinguish Section 8 from Section 7 on the ground that, since an administrative finding of the individual's membership is a prerequisite to the orders issuing under Section 13(g)(2), the registration requirement serves no additional disclosure function. The short answer is that, in the absence of more comprehensive interpretation of the Act, particularly regarding the sanctions, we do not know whether an additional function is performed.

We are dealing with an unusual statute. Congress conceived the Subversive Activities Control Act as a comprehensive regulatory scheme, comprising Board proceedings leading to registration orders, restrictions imposed on all those who were the subjects of registration orders, and penalties levied on those who disobeyed the orders. The Supreme Court, in the 1961 opinion, refused to consider the legal consequences arising out of the sanctioning provisions, but affirmed the issuance of registration orders as a means reasonably related to the achievement of a goal within the general area of Congress' competence to legislate. Since the order here appears to be reasonably related to Congress' general objective, and, since there has been no determination that that goal or the means of achieving it employed in this Act are invalid on other constitutional grounds, we cannot now entertain constitutional objection on grounds that there is no independent governmental purpose.

2. Petitioners contend next that the registration provisions violate the First Amendment "because they extort declarations contrary to belief and conscience." This is, in essence, an argument that freedom of speech embraces a right not to identify oneself publicly with a political organization, since any such identification inevitably involves [fol. 73] attribution to the individual of what either are, or are asserted to be, the political ideals and objectives of the organization. We believe, however, that the 1961 opinion of the Supreme Court settled this question by

holding that the menace of the communist conspiracy, as found to exist by the Congress, justified such invasions of private rights. As pointed out in that case, registration requirements are not a new approach to the Government's problem of getting information and, in some cases, making it public. The courts have upheld this general approach, subject, of course, to the scrutiny in each case of the private right in relation to the governmental purpose. See *United States v. Harriss*, 347 U.S. 612 (1954) (upholding the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270); *Burroughs v. United States*, 290 U.S. 534 (1934) (upholding the Federal Corrupt Practices Act, 2 U.S.C. §§ 241-245); *American Communications Assn. v. Douds*, 339 U.S. 382 (1950) (upholding the oath requirements of the Taft-Hartley Act); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); cf. The Foreign Agents Registration Act, 22 U.S.C. §§ 611-621. Compare *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) and *Thomas v. Collins*, 323 U.S. 516 (1945).

3. Petitioners further contend that the registration provisions violate the First Amendment and the Due Process Clause "because they impose unjustifiable restraint on association." That part of the question which is before us now, whether the registration provisions alone place forbidden pressures on the freedom of association, has been answered by the Supreme Court in the negative.⁷

⁷ If the petitioners seek to pose the question "Whether Congress has power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the future or on the ground that it is ideologically subservient to some foreign country," (taken from Justice Black's 1961 dissenting opinion, 367 U.S. at 147) the question is premature, as the 1961 majority opinion makes plain. For, according to that opinion, in the absence of any consideration of the sanctions attaching to a registration order, the statute does not "outlaw an association, group or party" (emphasis added); it is simply a regulatory statute. Thus the majority opinion did not consider the question posed, and we may not consider it until such time as the Act's sanctions are before us.

[fol. 74] 4. Finally, it is suggested that the provisions constitute a bill of attainder "because the 1953 determinations as to the character of the Communist Party is made conclusive against petitioners." In the absence of any showing that circumstances have changed significantly since the Board's determination of the Party's status in 1953, we do not find it necessary to reexamine this issue here. See *National Council of American-Soviet Friendship, Inc. v. SACB*, — U.S.App.D.C. —, 322 F.2d 375, 392 (1963); *Weinstock v. SACB*, — U.S.App. D.C. —, — F.2d — (No. 13,422, decided Dec. 17, 1963) (concurring opinion); *Flynn v. Rusk*, 219 F. Supp. 709, 713 (D.D.C. 1963) (cert. granted); cf. *Communist Party v. SACB*, 367 U.S. at pp. 82-88; *Jefferson School of Social Science v. SACB*, — U.S.App.D.C. —, — F.2d — (No. 12,876, decided Dec. 17, 1963). Also see, footnote 6, *supra*.

The orders of the Board in these cases are

Affirmed.

Bastian, *Circuit Judge*, concurs in the result.

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,492

WILLIAM ALBERTSON, Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

No. 17,623

ROSCOE QUINCY PROCTOR, Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

On Petitions for Review of Orders of the Subversive Activities Control Board.

Before: Bazelon, Chief Judge, and Bastian and McGowan, Circuit Judges.

JUDGMENT—April 23, 1964

These cases came on to be heard on the records from the Subversive Activities Control Board, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the orders of the Subversive Activities Control Board on review in these cases are hereby affirmed.

Per Circuit Judge McGowan.

Circuit Judge Bastian concurs in the result.

[File endorsement omitted]

[fol. 78] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 265, October Term, 1964

WILLIAM ALBERTSON, et al., Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

ORDER ALLOWING CERTIORARI—May 17, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice White took no part in the consideration or decision of this petition.



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IN THE

Supreme Court of the United States

October Term, 1963

No. 2

3

WILLIAM ALBERTSON and ROSCOE
QUINCY PROCTOR,

Petitioners,

v.

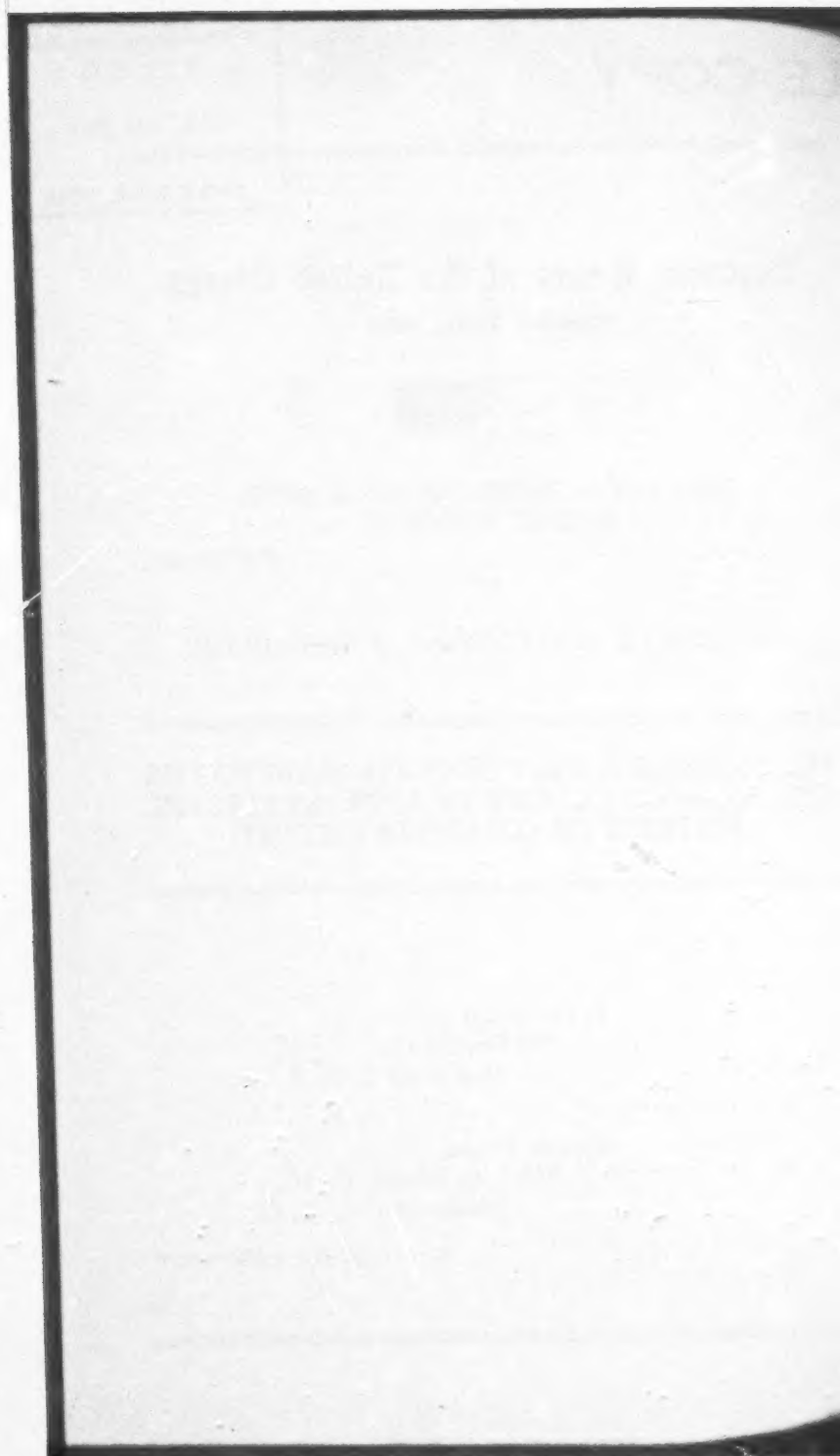
SUBVERSIVE ACTIVITIES CONTROL BOARD.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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IN THE
Supreme Court of the United States
October Term, 1963

No.

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

The petitioners, William Albertson and Roscoe Quincy Proctor, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case.

Opinion Below

The opinion of the Court of Appeals (R. 62-74; Appendix A, *infra*) has not yet been reported.

Jurisdiction

The judgment below (R. 75; Appendix B, *infra*) is dated and was entered on April 23, 1964. The jurisdiction of this Court is conferred by section 14(a) of the Subversive Activities Control Act (herein called the Act), 64 Stat. 1001, 50 U. S. C. 793, and 28 U. S. C. 1254.

Questions Presented

The judgment below affirmed orders of the Subversive Activities Control Board (herein called the Board) requiring petitioners to register themselves with the Attorney General pursuant to section 8 of the Act as members of "the Communist Party of the United States of America, a Communist-action organization." The questions presented are:

1. Whether the Court of Appeals was required to adjudicate petitioners' claims of privilege under the Fifth Amendment against being compelled to register themselves pursuant to section 8 of the Act.

2. Whether the member registration provisions of the Act and the Board's registration orders violate petitioners' privilege against self-incrimination.

3. Whether the member registration provisions of the Act, on their face and as applied, violate due process and the First Amendment because they serve no governmental purpose while compelling self-defamation and invading freedom of belief, conscience and association.

4. Whether the member registration provisions of the Act, on their face and as applied, violate due process and the prohibition against bills of attainder because the Board's 1953 determination that the Communist Party was a Communist-action organization is made conclusive on petitioners as to the present character of the Communist Party.

5. Whether the member registration provisions of the Act unconstitutionally deny petitioners the safeguards of judicial trial, trial by jury and grand jury indictment by making the Board's determinations of petitioners' membership in the Communist Party and of the character of the Communist Party conclusive in prosecutions of petitioners for non-compliance with the Board's registration orders.

Statute and Regulations Involved

The pertinent provisions of the Subversive Activities Control Act and the regulations and registration forms prescribed by the Attorney General are set forth in Appendix C, *infra*.

Statement of the Case

This case brings to the Court for the first time the constitutionality of the member registration provisions of the Act.

Sections 7 and 13 of the Act authorize proceedings before the Board, on petition of the Attorney General, for an order requiring an organization to register with the Attorney General as a Communist-action organization and to file a registration statement containing detailed information, including a list of its members. Section 8 provides that if an organization fails to register in obedience to such an order within thirty days after it becomes final,¹ each member of the organization shall register himself as such with the Attorney General.

A member of the organization who fails to register incurs no penalty at this point. Section 13, however, authorizes the Attorney General to petition the Board to find that an accused individual is a member of the organization and to order him to register as such under section 8. An individual who fails to register in compliance with a final order of the Board that he do so is punishable by imprisonment for five years and a fine of \$10,000, both cumulative for each day that the failure continues (sec. 15(a)).

The registration of an individual must be accompanied by a registration statement containing information pre-

¹ Orders of the Board become final upon exhaustion of judicial review (sec. 14(c)).

scribed by the Attorney General (sec. 8(c)). Failure to file this statement is punishable by imprisonment for five years and a \$10,000 fine (sec. 15(a)).

Regulations of the Attorney General provide that the registration of an individual shall be accomplished by the filing of a form (Form IS-52a) which consists solely of a statement to be signed by the registrant that he "hereby registers as a member of _____, a Communist-action organization." The registration statement prescribed by the regulations consists of a separate form (Form IS-52). It calls for the registrant's name, all other names used by him during the past ten years, the date and place of his birth, the name of the Communist-action organization of which he is a member, and a list and description of the duties of all offices held by him in the organization during the preceding year. See Appendix C, *infra*.

On May 31, 1962, the Attorney General instituted separate proceedings before the Board for orders requiring petitioners to register as members of the Communist Party. The Attorney General alleged that the Communist Party had not complied with a final order that it register as a Communist-action organization, that petitioners were members of the Party, and that they had not registered as such. (R. 2, 30.)

Each petitioner filed an answer, which he signed and swore to, alleging that sections 8 and 13 of the Act, on their face and as applied, violated his privilege against self-incrimination, which he thereby asserted. The answers denied that the Communist Party is a Communist-action organization and declined, in reliance on petitioners' constitutional privilege, to answer the allegations of the petition that they were members of the Communist Party. (R. 5, 33.)

It was stipulated at the hearings that the Communist Party had not registered as a Communist-action organization, and that petitioners had not registered as members (R.

16, 43). The Attorney General's evidence consisted of the testimony of paid informers that petitioners had attended meetings of the Communist Party and had been elected to Party offices (R. 10-11, 16-24, 37-38, 44-49). Petitioners offered no evidence.

The Board issued reports and orders finding each petitioner to be, and ordering him to register as, "a member of the Communist Party of the United States of America, a Communist-action organization" (R. 25-26, 57-58).

In their petitions for review by the court below, each petitioner again claimed his privilege against self-incrimination (R. 28, 60).²

The court below affirmed the Board's orders, holding (Appendix A, *infra*) that adjudication of the privilege issue must await prosecution of petitioners for non-compliance with the registration orders, and that consideration of the remaining issues was either likewise premature or foreclosed by *Communist Party v. S.A.C.B.*, 367 U. S. 1 (herein called the *Communist Party* case).

Reasons for Allowing the Writ

This is the first case under the member registration provisions of the Act to reach the courts. By agreement with the government, it is the test case of the constitutionality of these provisions. Registration orders like the two involved here have been issued against 26 other persons, each of whom has claimed his privilege against self-incrimination in the same manner as petitioners. Petitions to review these orders have been filed in the court below, and the cases are being held on stipulations that they will abide the result in this case and will be disposed of in accordance with the judgment that is ultimately entered herein. Eight addi-

² In the court below, petitioners confined their briefs and argument to the constitutional issues.

tional member registration cases are pending before the Board, and if the decision below is allowed to stand, many more such proceedings will be instituted.

The constitutional questions raised by the member registration provisions are substantial, and contrary to the court below, none of them has been settled by the *Communist Party* decision. If the provisions are valid, they put the executive branch into the odious business of hunting down political dissenters and compelling them to defame and incriminate themselves.

The court below affirmed the registration orders without deciding fundamental constitutional issues. Thus it ruled that adjudication of petitioners' claims of the privilege against self-incrimination must await their prosecution for failure to register (Appendix A, *infra*, pp. 26-27).³ Again, the court refused to decide whether the member registration requirement serves any legislative purpose because of "the absence of more comprehensive interpretation of the Act" than this Court gave in the *Communist Party* case (*id.*, p. 29). Thus the decision below requires petitioners, and all other persons ordered to register, to risk the enormous cumulative penalties of section 15(a)—in effect, life imprisonment—in order to secure an adjudication of their constitutional rights. This unconscionable result is incompatible with a fair and responsible administration of justice. Moreover, it is based on a misreading of the *Communist Party* case and is in conflict with other decisions of the Court.

³ Similarly dismissed as premature was petitioners' contention that the Act unconstitutionally denies them a judicial and jury trial (Appendix A, *infra*, p. 27, n. 6).

1. The privilege against self-incrimination.

a. The government's brief in the court below stated (p. 15, n. 9): "We do not take issue with petitioners' argument . . . that the privilege issue is not premature in this proceeding." This concession, not mentioned in the opinion below, was required by the logic of the *Communist Party* case as well as by a proper regard for the constitutional rights of litigants.

A bare majority in the *Communist Party* case (at 106-10) held it premature, on review of the registration order against the Party, to decide whether the Act and the order violated the privilege of the Party's officers who were obliged to execute the registration documents.⁴ The ground for this conclusion was that no claim of privilege had as yet been made by the officers or ruled on by the Attorney General. The Court stated, at 107:

"We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions."

Contrary to the situation in the *Communist Party* case, adjudication of the privilege issue in this proceeding involves no "supposition." Here, each petitioner personally claimed his privilege against being compelled to register in his signed answer to the Attorney General's petition (R. 5-6, 33-34). The Attorney General rejected petitioners' claims by continuing to prosecute the proceedings, and the Board rejected them by issuing the registration orders. Petitioners' claims of the privilege were reiterated in their petitions for review by the court below (R. 28, 60), and were again rejected by the Board and its attorney, the Attorney General, not as inadequate or premature but on

⁴ The dissenting Justices believed (at 175-202) that the issue was not premature and that the registration order was invalid because it violated the privilege of the Party's officers.

the ground that the claims lacked constitutional merit. See Brief for Respondent in the court below, pp. 13-20.

The court below was plainly wrong in stating that "these circumstances were, of course, all present in the record before the Supreme Court in the *Communist Party* review proceeding" (Appendix A, *infra*, p 26). On the contrary, it was the absence from the record in that case of any claim of privilege by the Party's officers that was the controlling circumstance in the Court's ruling on prematurity.

Since petitioners have claimed the privilege, to postpone an adjudication of their claims until they are prosecuted for non-compliance with the registration orders would deny them the full protection of the Fifth Amendment. The Amendment prohibits *compelling* a person to incriminate himself. Affirmance of the registration orders and the threat of daily cumulative criminal penalties for disobedience obviously exert compulsion upon petitioners to register. If their claims of privilege are valid, the Amendment entitles them to protection against such compulsion. The protection can be given only by adjudicating their claims in this proceeding.

Finally, in the *Communist Party* case, the privilege was asserted for persons who were not parties to the litigation. Here, in contrast, it is the litigants themselves who have claimed the privilege and, following rejection of their claims by the Attorney General and the Board, demand an adjudication. To withhold adjudication in these circumstances serves no purpose other than to pressure petitioners to surrender their constitutional protection. Such a course also violates the principle that where disobedience of an administrative order is punishable by severe cumulative criminal penalties, due process requires that a civil remedy be available to test the validity of the order. *Ex Parte Young*, 209 U. S. 123; *Oklahoma Operating Co. v. Love*, 252 U. S. 317. Cf. *Reisman v. Caplin*, 375

U. S. 440, 446-49. Accordingly, the court below was wrong in stating (Appendix A, *infra*, p. 27) that the criminal prosecutions of petitioners for violating the registrations orders "will provide an adequate forum for litigation of [the privilege] issues." On the contrary, it is only in these proceedings to review the Board's registration orders that petitioners can enjoy the remedy to which *Ex Parte Young* entitles them.

b. The question whether the Act and the orders of the Board violate petitioners' privilege against self-incrimination is, to say the least, a substantial one, as the court below recognized. See Appendix A, *infra*, p. 24.

The orders require petitioners to sign and file registration documents (*supra*, p. 4) in which they must state that they are members of the Communist Party at the time they register, admit that the Party is a Communist-action organization, list the offices that they hold in the organization, and disclose other incriminating information. Such disclosure cannot be compelled against a claim of privilege. *Blau v. United States*, 340 U. S. 159; *Quinn v. United States*, 349 U. S. 155; *Scales v. United States*, 367 U. S. 203; *Communist Party v. United States*, 331 F. 2d 807, cert. den. June 8, 1964, *sub nom.*, *United States v. Communist Party*.

Congress recognized that self-incrimination was inherent in the registration features of the Act and sought to avoid it by the inclusion of section 4(f).⁵ That section, however, merely excludes the use of the fact of a registrant's registration as evidence against him of his membership or officership, in the Communist Party. It does not give a registrant immunity from prosecution on account of membership or officership. Hence it is not an adequate substitute for, and therefore cannot displace, the privilege. *Counselman v. Hitchcock*, 142 U. S. 547; *United States v.*

⁵ The legislative history of the section is reviewed in *Scales v. United States*, *supra*, at 212-19, and 279-86 (dissenting opinion).

Bryan, 339 U. S. 323, 336; *Scales v. United States*, *supra*, at 206-219; *Communist Party v. United States*, *supra*, at 813, n. 10.⁶

Section 4(f) has the additional inadequacy that it does not accord protection against all evidentiary uses of the incriminating admissions required by a registration order. First, while the section bars the receipt in evidence of the registration documents for the purpose of proving a registrant's Communist Party membership or officership, it does not preclude their receipt to prove other incriminating admissions in the documents, including the admission that the organization to which the registrant belongs is a Communist-action organization.⁷ Second, the bar of the section applies only "in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute." Thus the section does not apply in prosecutions for violating provisions of the Act other than section 4(a) and (c). Hence, it does not preclude introduction of the registration documents to prove the registrant's Communist Party membership in a prosecution for violating the employment or labelling provisions of sections 5 and 10.

2. Substantive due process.

A law which compels compliance with exactions having no governmental purpose is an arbitrary and unreasonable exertion of governmental power, prohibited by due process.

⁶ Nothing in *Murphy v. Waterfront Commission*, — U. S. —, June 15, 1964, alters the *Counselman* rule where, as here, the claim of the privilege is addressed to a federal authority and is based on incrimination under federal law. Moreover, section 4(f) does not bar use of the fruits of the incriminating admissions.

⁷ By definition, a Communist-action organization is a seditious, foreign-controlled association. Act, secs. 3(3) and 2; *Communist Party* case at 55-56, 88-89. An admission that the organization is of such a character is obviously incriminating under both section 4(a) of the Act and the Smith Act.

See *Nebbia v. New York*, 291 U. S. 502, 525; *Perez v. Brownell*, 356 U. S. 44, 58. This principle condemns the member registration requirements of the Act.

The *Communist Party* case, at 88-105, sustained the constitutionality of section 7(d) of the Act, requiring a Communist-action organization to furnish the names of its members to the Attorney General, on the ground that the government has a security interest in disclosure of the identity of the members of such an organization. There can be no such justification for the Act's provisions for registration by the members themselves. Identification of the person as a member and disclosure of his membership is accomplished by the Board's findings, which are prerequisite to the issuance of a registration order. Sec. 13(g)(2). Compulsory self-identification of a member by registration thereafter is thus entirely superfluous to any disclosure objective. Nor does such self-identification serve any other legitimate purpose.

The court below did not find that the registration of a person as a member of a Communist-action organization in obedience to a Board order serves any function not already accomplished by the Board's finding, that he is a member. Instead, it held (Appendix A, *infra*, p. 29) that "in the absence of more comprehensive interpretation of the Act, particularly regarding the sanctions," than this Court gave in the *Communist Party* case, "we do not know whether an additional function is performed."

The court did not explain, and it is impossible to understand, why an interpretation of the Act's sanctions⁸ is necessary before deciding whether a person's self-identification as a member serves some governmental purpose not performed by the Board's finding that he is a member.

⁸ The court used the term "sanctions" to refer to the provisions of the Act imposing civil disabilities, such as the denial of passports and certain types of employment, upon members of organizations ordered to register.

But if such an interpretation were a prerequisite to adjudication of the due process question which this case presents, then it was up to the court below to do the interpreting, instead of abdicating its judicial function. In any event, the "interpretation" that the court below said was needed has now been supplied. The invalidation of section 6 of the Act by *Aptheker v. Secretary of State*, — U. S. —, June 22, 1964, puts an end to the court's speculation that an interpretation of the sanctions might reveal some hidden function for the member registration requirement.

3. The First Amendment.

The due process defect of the Act, arising from its exaction of conduct which serves no governmental purpose, is compounded by the fact that the conduct exacted is speech. Moreover, the speech is in the form of a declaration contrary to the conscience and belief of the declarant. For these reasons, the Act and the Board's orders violate the First Amendment as well as due process.

The freedom of speech protected by the Amendment embraces not merely freedom to say what is on one's mind, but also freedom to refrain from voicing a text dictated by the government. *W. Va. Bd. of Ed. v. Barnette*, 319 U. S. 624. If the registration orders exacted only the most innocuous of declarations, they would still violate the First Amendment. Under either the clear and present danger test or the balancing test, there must, at a minimum, be some valid reason for a governmental order that a person say what it prescribes or lose his liberty. "No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no state interest underlies the state action." *Sweezy v. New Hampshire*, 354 U. S. 234, 254.

The declaration exacted by the registration orders is far from innocuous. It is a coerced admission of political af-

filiation, historically a tool of oppression. By making the admission, the registrant bows to the proposition that government has the right, as an end in itself, to inquire into, determine, and compel the avowal of, political affiliations. Furthermore, because it is compelled on the basis of governmental findings that the Communist Party is a criminal conspiracy, registration is a statement of acquiescence in the findings and is self-defamatory. Indeed, the registration documents prescribed by the Attorney General require registrants to state in so many words that the Communist Party is a Communist-action organization, thereby making explicit what is implicit in the act of registering. (See secs. 11.206 and 11.207 of the Attorney General's regulations and forms IS-52a and IS-52, Appendix C, *infra*.)

Thus the member registration requirements compel persons to signify submission to the government's orthodoxy concerning the nature of Communism and the Communist Party, to forswear themselves by certifying as true what they believe to be false, and to defame themselves by acknowledging membership in a seditious conspiracy. Because of the First Amendment, however, the government may not "compel affirmation of a repugnant belief." *Sherbert v. Verner*, 374 U. S. 398, 402; *Torcaso v. Watkins*, 367 U. S. 488, 495. Nor may a person be required to affirm the correctness of an administrative or judicial finding against himself. *Art Metals Construction Co. v. N.L.R.B.*, 110 F. 2d 148; *Hartsell Mills Co. v. N.L.R.B.*, 111 F. 2d 291; *Kansas City P. & L. Co. v. N.L.R.B.*, 111 F. 2d 340; *Swift & Co. v. N.L.R.B.*, 106 F. 2d 87; *N.L.R.B. v. Louisville Refining Co.*, 102 F. 2d 678.

The member registration requirements violate the First Amendment for an additional reason. To compel members of the Communist Party publicly to register as such obviously restrains their association in the organization. Restraints on membership in the Communist Party may "not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress

has a right to prevent.' " *Scales v. United States*, 367 U. S. 203, 229; *Aptheker v. Secretary of State*, *supra*. As we have seen, the requirement of self registration has no relation to any substantive evil within the competence of Congress. Moreover, the requirement applies to persons whose participation in the Communist Party is wholly innocent and limited to constitutionally protected conduct. Hence the requirement is condemned by the First Amendment. Cf. *Brown v. United States*, — F. 2d —, C. A. 9, June 19, 1964.

There is no substance to the view of the court below (Appendix A, *infra*, pp. 29-30) that the *Communist Party* decision forecloses the First Amendment objections to the member registration provisions of the Act. What that case decided (at 88-105) was that the interest of the members of a Communist-action organization in the anonymity of their political association was outweighed "in the constitutional balance" by the government's interest in the disclosure of their identity. We think that this holding should be re-examined and overruled, but it does not govern the present case. Here, any governmental interest in disclosure of the names of Communist Party members is fully satisfied by the findings of the Board. Self-identification as a member by registration is therefore unnecessary for disclosure and has no rational relation to any other governmental interest. Since the court below found nothing, and there is nothing, to put in the balance on the side of the registration requirement, the orders of the Board cannot survive the balancing test applied in the *Communist Party* case, much less the clear and present danger test.

4. Procedural due process and attainder.

The Attorney General introduced no evidence at the administrative hearing to support the allegation of his petitions (R. 3, 31), denied in petitioners' answers (R. 5, 33), that the Communist Party is a Communist-action organiza-

tion. Instead, he relied upon, and the Board held that petitioners were bound by, the Board's 1953 determination in the registration proceeding against the Party (R. 13-14, 41-42, 53-54).

Thus, in 1962, petitioners were ordered to register on the basis of a determination as to the character of the Communist Party made nine years earlier in a proceeding to which they were not parties. This procedure, though undoubtedly required by the Act, violates the due process principle that liability may not be imposed on a person without affording him a hearing at which he may contest the factual issues on which the liability depends. *Noto v. United States*, 367 U. S. 290, 299; *Renaud v. Abbott*, 116 U. S. 277, 288. Cf. *Kirby v. United States*, 174 U. S. 47.

The constitutionality of the Board's registration orders against petitioners depends on the truth of the premise that the Communist Party was a Communist-action organization at the time the administrative hearings were held and the orders were issued. Accordingly, even if it could be said that because petitioners were found to be members of the Communist Party they are bound by the 1953 determination, they would still be entitled to a hearing on the *present* character of the organization. This is denied them by the Act. While section 13(b) and (i) permits an organization which has registered as a Communist organization to secure a redetermination of its status by showing that it no longer has the characteristics attributed to it by the Board, neither the members of the organization nor an unregistered organization⁹ or its members may seek such redetermination.

The Act therefore violates the principle that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United*

⁹ The Communist Party has not registered, and the enforcement proceeding against it is still in litigation. See *Communist Party v. United States*, *supra*.

States v. Carolene Products Co., 304 U. S. 144, 153; *Chastleton Corporation v. Sinclair*, 264 U. S. 543; *Baker v. Carr*, 369 U. S. 186, 214. This rule is peculiarly pertinent since, as the Chief Justice observed in his dissent in the *Communist Party* case (p. 134, n. 11), the Board's 1953 finding was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940.

Accordingly, the member registration requirements of the Act as here applied do *not*, in the words of the *Communist Party* decision (at 87), "arise only because of, and endure so long as, an organization presently conducts operations of the described character." On the contrary, the requirements attach "to the past and ineradicable actions of an organization" (*ibid.*). For that reason, the orders of the Board not only deny procedural due process but constitute bills of attainder.¹⁰

The court below dismissed these contentions by stating (Appendix A, *infra*, p. 31): "In the absence of any showing that circumstances have changed significantly since the Board's determination of the Party's status in 1953, we do not find it necessary to reexamine the issue here." This begs the question, since the Act and the ruling of the Board (R. 13-14) precluded petitioners from making any such showing.¹¹

¹⁰ The Board's orders attain petitioners for the additional reason that the administrative determination on which petitioners' liability to register depends, that the Communist Party is a Communist-action organization, is a condemnation of that organization as a criminal enterprise. Such a condemnation, made without a judicial trial and not subject to reconsideration in a judicial trial, constitutes a bill of attainder. See Note, 72 Yale L. Jour. 330.

¹¹ One changed circumstance is recognition of the fact that the basic premise of the Act and the Board's 1953 findings—that the world Communist movement is a monolithic, Soviet-directed conspiracy to destroy all free governments—is what Senator Fulbright calls "the master myth of the cold war." See 110 Cong. Rec. 6029 (daily pagination).

5. The denial of a trial by jury and judicial trial.

The Act (secs. 8, 15) makes the Board's 1953 finding that the Communist Party was a Communist-action organization and its 1962 findings that petitioners were members of the Party conclusive in criminal prosecutions of petitioners for non-compliance with final Board orders requiring them to register. Thus the Act subjects petitioners to criminal liability for failing to register as members of a Communist-action organization on the basis of an administrative determination of two of the three elements of the offense. In this respect, the Act and the Board's orders deny petitioners the constitutional safeguards of indictment by grand jury, judicial trial and trial by jury in violation of the Fifth and Sixth Amendments, Art. III, sec. 2, cl. 3, Art. III, sec. 1, and Art. I, sec. 9, cl. 3. *United States v. Spector*, 343 U. S. 169, 174 *et seq.* (dissenting opinion);¹² *Wong Wing v. United States*, 163 U. S. 228; *Fraenkel, Can the Administrative Process Evade the Sixth Amendment?*, 1 Syracuse L. Rev. 173. Cf. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 165-67. The Act's denial of these safeguards is the more egregious because the sole constitutional justification for the registration requirements is that they apply only to organizations having the characteristics of a Communist-action organization and to members of such organizations. See *Communist Party* case, at 88-92.

The court below held (Appendix A, *infra*, p. 27, n. 6) that this objection was premature and would be ripe for consideration only when petitioners are prosecuted for non-compliance with the Board's orders. But under *Ex Parte Young*, *supra*, petitioners are entitled to an adjudication of their constitutional contentions in a civil proceeding before incurring the Act's enormous cumulative penalties for

¹² The majority refused to consider this question because it had not been presented.

violating the registration orders. Since the present proceeding provides the only opportunity for such adjudication, petitioners' constitutional attack is not premature. See *supra*, pp. 8-9.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17,492

WILLIAM ALBERTSON,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

No. 17,623

ROSCOE QUINCY PROCTOR,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
SUBVERSIVE ACTIVITIES CONTROL BOARD

Decided April 23, 1964

MESSRS. JOHN J. ABT, of the bar of the Court of Appeals
of New York, *pro hac vice*, by special leave of court, and
JOSEPH FORER, for petitioners.

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MR. KEVIN T. MARONEY, Attorney, Department of Justice, with whom ASSISTANT ATTORNEY GENERAL J. WALTER YEAGLEY, MESSRS. FRANK R. HUNTER, JR., General Counsel, Subversive Activities Control Board, and GEORGE B. SEARLS and MRS. LEE B. ANDERSON, Attorneys, Department of Justice, were on the brief, for respondent. MR. PETER PAUL HANAGAN, Attorney, Subversive Activities Control Board, also entered an appearance for respondent.

MR. LEONARD B. BOUDIN filed a brief in No. 17,623 on behalf of National Lawyers Guild, as *amicus curiae*, urging reversal.

Before BAZELON, *Chief Judge*, and BASTIAN and McGOWAN, *Circuit Judges*.

McGOWAN, *Circuit Judge*: These are proceedings for review, pursuant to § 14a of the Subversive Activities Control Act (50 U. S. C. § 781 *et seq.*), of two separate orders of the Subversive Activities Control Board requiring petitioners, Albertson and Proctor, to register under Section 8 of the Act as members of "the Communist Party of the United States of America, a Communist-action organization." Petitioners do not claim any deviation by the Board from the prescribed statutory procedure; nor do they assert that the orders are not supported by adequate evidence. Rather, they attack the orders on the ground that the underlying statutory provisions are, for various reasons, unconstitutional.

These claims of constitutional infirmity fall into two groups. The first is compounded of arguments which import that the orders are invalid because of certain consequences which might flow from failure to comply with

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them. We do not consider these questions ripe, as yet, for judicial consideration. The second group is addressed to the proposition that the bare existence of orders, without more, impairs petitioners' constitutional rights. As to these grounds, we affirm the Board's action.

I

The scheme of the statute involved in these cases is that, if a Communist-action organization fails to register as required by an order of the Board (issued pursuant to Sections 7 and 13 of the Act) and thereby fails to disclose its membership, the members individually may be compelled to register as such.¹ This individual obligation attaches only after default by the organization and only after the fact of membership has been found to exist in a proceeding before the Board initiated by the Attorney General against a particular person.² Registra-

¹ Section 8 of the Act provides:

(a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

² Section 13 of the Act provides:

(a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under

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tion itself consists of filing a signed registration form identifying oneself as a member of the organization and giving one's address.³ The statute also provides that this act of registration is to be accompanied by the filing of a separate registration statement containing such information as the Attorney General may, by regulation, prescribe.⁴ Pursuant to this grant of authority, the Attorney General has called for such additional information as date and place of birth, *aliases* used during the past ten years, and all offices held in the organization presently or during the preceding twelve months, together with a de-

such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

* * *

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

* * *

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a) of this title, [*sic*] it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

³ Form IS-52a, Budget Bureau No. 43-R414 (Ed. 9-6-61).

⁴ Section 8(c) of the Act provides:

The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

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scription of the duties performed during any such tenures of office.⁵ Failure by an individual to comply with a Board order requiring him to register is punishable by a fine of not more than \$10,000, or imprisonment for not more than five years, or both, with each day of non-compliance constituting a separate offense. These penalties follow upon conviction pursuant to the usual criminal processes established independently of the Act.

These proceedings were initiated by the Attorney General's representations to the Board that petitioners were members of the Communist Party of the United States; that that organization had theretofore been found by the Board to be a "Communist-action organization" and ordered to register under Section 7 of the Act; that such organization had not registered; and that, accordingly, the Board should order petitioners to register under Section 8. The answers filed by petitioners denied that the Communist Party was a "Communist-action organization"; refused, by reason of a claim of privilege against self-incrimination, to answer the allegations of petitioners' membership in the Party; and asserted the invalidity of Sections 8 and 13 of the Act on various constitutional grounds. After separate hearings at which the Attorney General adduced evidence and petitioners did not, the orders under review were issued.

II

Petitioners press strongly the contention that the membership registration provisions of the Act collide directly with their Fifth Amendment immunity against self-incrimination; and that, because of this conflict, the Board's orders should now be declared invalid. Congress has, they say, so legislated with respect to the Communist Party that membership therein has taken on direct and

⁵ Form IS-52, Budget Bureau No. 43-R301.2.

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serious criminal connotations, creating dangers of such a nature as to relieve against any duty, however imposed, of self-revelation. The argument, in substance, is that there is no room within the Fifth Amendment for the simultaneous operation of the contrasting legislative approaches of prohibition on pain of criminal punishment, on the one hand, and regulation through the publicity of compelled disclosure, on the other.

That the point is not without force is evident from the recent decision of this court in *Communist Party v. United States*, — U. S. App. D. C. —, — F. 2d — (No. 17,583, decided Dec. 17, 1963). That was an appeal by the Communist Party of the United States from its conviction by a jury on an indictment for failing to register as a Communist-action organization, as required by a Board order issued pursuant to Sections 7 and 15 of the Act. We reversed and remanded for a new trial on the ground that, since the registration requirements involved action on behalf of the organization by an officer or authorized individual who would thereby identify himself with the Party, the self-incrimination shield of the Fifth Amendment placed the prosecution in a criminal trial under the necessity of proving, as an essential element of the crime charged, the availability to the defendant organization of an individual willing to effect the registration and to assume the concomitant risk of criminal exposure. There having been a deficiency of proof in this respect, we set aside the Party's conviction but afforded the Government an opportunity to supply such proof in a new trial.

That case, however, presented us with an appeal from a criminal conviction for refusing to comply with a Board order, and not with a statutory review of the order itself. The latter proceeding, indeed, had already taken place, culminating in the Supreme Court's decision in *Communist Party v. Subversive Activities Control Board*, 367

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U. S. 1 (1961), upholding the Board's order which found the Communist Party to be a "Communist-action organization" and which required it to register as such. In that review proceeding, the Party advanced many contentions with respect to the invalidity of the order and of the Act under which it was issued. Many of these were founded in the Constitution. None prevailed, and most were disposed of on the merits. A conspicuous exception in this latter respect was the self-incrimination attack upon the requirement that the Party register.

The Supreme Court explicitly refrained from passing upon the merits of this challenge because it was premature. *Communist Party v. SACB*, 367 U. S. 1, 105-110 (1961). The Court pointed out that there were certain contingencies standing between the bare issuance of the order requiring registration and its enforcement as against a claim of the privilege. One was whether the privilege would in fact be claimed, and another was whether, if claimed, it would be honored. Over and above these matters, however, the Court also noted that any disallowance of a claim of the privilege in the context of this Act is likely to raise complex and difficult legal issues which can best be dealt with in the precise factual setting in which they finally arise. Questions of this nature, said the Court, are "questions which should not be discussed in advance of the necessity of deciding them"; and it went on to say that the point when that necessity exists, if ever, is "when enforcement proceedings for failure to register are instituted against the Party or against its officers."

We think the same reasoning extends to the registration requirements applicable to members of the Party. It is pressed upon us that, unlike the situation as it was before the Supreme Court, here the privilege has been claimed and denied. But the facts relied upon in support of this contention are, in respect of the claim, that the privilege was advanced in petitioners' answers to the At-

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torney General's petition to the Board initiating these proceedings; and that it was asserted again in the petition for review in this court. With respect to denial, this is said to reside in the action of the Attorney General in continuing the proceedings before the Board in the face of the answers, the action of the Board in issuing the orders, and the action of the Attorney General, as the Board's lawyer, in defending the orders before this court.

But these circumstances were, of course, all present in the record before the Supreme Court in the *Communist Party* review proceeding, and do not, in and of themselves, offer any basis for differentiating this case from that in terms of prematurity. What is new since the earlier decision is the fact that the Attorney General did receive and reject a claim of privilege anonymously tendered on behalf of officers of the Party, and did move to have the Party indicted, tried and convicted in criminal proceedings for failure to comply with the registration order. It could presumably be urged upon us, although petitioners appear not to have done so in their papers, that this demonstrates beyond peradventure that any claim of privilege by petitioners as a justification for not registering will inexorably be followed by criminal prosecution, and that this court, anticipating that certainty, should go ahead now and decide the issues relating to the privilege.

It is to be remembered, however, that the criminal prosecution of the Party has thus far resulted in a judicial determination that the registration requirement of the Act, at least in the case of the Party and its officers, presents major problems in respect of the Fifth Amendment privilege. It seems unlikely that these problems are without parallel in the case of mere members of the Party. In any event, it is by no means clear as of this moment, any more than it was at the time of the Supreme Court decision, that affirmance of the orders before us will inevitably result in the invocation of criminal processes *vis-a-vis* the peti-

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tioners for failure to register pursuant to a claim of Fifth Amendment immunity. If denial of that claim in the future is pressed to the point of criminal prosecution, it remains true that, insofar as the protective reach of the Fifth Amendment is concerned, that proceeding "will provide an adequate forum for litigation of that issue." *Communist Party v. SACB*, 367 U. S. at 107. Apart from the natural apprehensions of petitioners with respect to the burdens of criminal prosecution, we believe it to be a better forum in the sense that legal issues can be resolved in the light of the peculiar factual setting in which they arise. Be this as it may, however, it is a forum which may never be reached, and we see no reason to anticipate decisions which may never have to be made.

Nor can we at this stage vacate the order on the ground that the statute is unconstitutional because it compels the production of potentially incriminating information while allowing "the exercise of the Fifth Amendment privilege only under circumstances which effectively nullify the Amendment's protection." *Communist Party v. SACB*, 367 U. S. at 109. See *Boyd v. United States*, 116 U. S. 616 (1886). Compare *Communist Party v. SACB*, 96 U. S. App. D. C. 66, 115-16, 223 F. 2d 531, 580-81 (1954) (BAZELON, J., dissenting). Whether the Subversive Activities Control Act is such a statute may not be determined, as the Supreme Court said in 1961, until the question is raised in a criminal prosecution.*

* Two other contentions made by petitioners fall within the sweep of what we have said hereinabove about ripeness. One is that the Act deprives petitioners of their right to a jury trial. This rests upon a reading of the statute as making the administrative determination of the status of the Communist Party binding upon petitioners in a criminal prosecution for non-compliance with the Board's orders. This is, obviously, a question of statutory construction, with constitutional implications, to be raised and decided when, and if, a criminal trial occurs.

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III

We turn now to those issues which are presently ripe for review. The same arguments here advanced were, for the most part, raised in respect of the registration order directed to the Communist Party, and were rejected in the 1961 opinion of the Supreme Court. Though different considerations may perhaps arise when, as here, the contentions are made on behalf of individuals, as distinct from the organization of which they are members, we nevertheless consider that case to be largely determinative of the remaining issues urged upon us in this proceeding.

1. The petitioners first contend that the registration provisions violate the Due Process Clause "because they exact admissions which serve no governmental purpose." The Supreme Court, in the 1961 case, held that the Government had a legitimate interest in discovering and disclosing the identity of members of the Communist Party. That conclusion obtains here as well. Section 8 operates only if the Party has not yet registered under Section 7. It is, thus, an alternative method of achieving the Gov-

The second derives from the challenge made to the grant of authority, in Section 8(c) of the Act, to the Attorney General to formulate, by regulation, the information to be supplied as an incident to registration. This authority is said to be so broad in scope and so lacking in standards for its exercise as to encounter sundry insurmountable constitutional obstacles. There is no showing that the regulations which the Attorney General has promulgated exceed the bounds of Congress' likely intentions. Compare the provisions of § 7(d) of the Act (prescribing the information to be contained in registration statements filed by Communist-action and Communist-front organizations). Until there is such a showing, the propriety of the Attorney General's actions and the conditions under which Congress has permitted him to act can best be inquired into judicially in a specific criminal prosecution, if any is ever initiated—a setting of greater factual concreteness.

Appendix A—Opinion Below

ernment's aim. Petitioners attempt to distinguish Section 8 from Section 7 on the ground that, since an administrative finding of the individual's membership is a prerequisite to the orders issuing under Section 13(g)(2), the registration requirement serves no additional disclosure function. The short answer is that, in the absence of more comprehensive interpretation of the Act, particularly regarding the sanctions, we do not know whether an additional function is performed.

We are dealing with an unusual statute. Congress conceived the Subversive Activities Control Act as a comprehensive regulatory scheme, comprising Board proceedings leading to registration orders, restrictions imposed on all those who were the subjects of registration orders, and penalties levied on those who disobeyed the orders. The Supreme Court, in the 1961 opinion, refused to consider the legal consequences arising out of the sanctioning provisions, but affirmed the issuance of registration orders as a means reasonably related to the achievement of a goal within the general area of Congress' competence to legislate. Since the order here appears to be reasonably related to Congress' general objective, and, since there has been no determination that that goal or the means of achieving it employed in this Act are invalid on other constitutional grounds, we can not now entertain constitutional objection on grounds that there is no independent governmental purpose.

2. Petitioners contend next that the registration provisions violate the First Amendment "because they extort declarations contrary to belief and conscience." This is, in essence, an argument that freedom of speech embraces a right not to identify oneself publicly with a political organization, since any such identification inevitably involves attribution to the individual of what either are, or are asserted to be, the political ideals and objectives of the organization. We believe, however, that the 1961 opinion

Appendix A—Opinion Below

of the Supreme Court settled this question by holding that the menace of the communist conspiracy, as found to exist by the Congress, justified such invasions of private rights. As pointed out in that case, registration requirements are not a new approach to the Government's problem of getting information and, in some cases, making it public. The courts have upheld this general approach, subject, of course, to the scrutiny in each case of the private right in relation to the governmental purpose. See *United States v. Harriss*, 347 U. S. 612 (1954) (upholding the Federal Regulation of Lobbying Act, 2 U. S. C. §§ 261-270); *Burroughs v. United States*, 290 U. S. 534 (1934) (upholding the Federal Corrupt Practices Act, 2 U. S. C. §§ 241-245); *American Communications Assn. v. Douds*, 339 U. S. 382 (1950) (upholding the oath requirements of the Taft-Hartley Act); *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63 (1928); cf. The Foreign Agents Registration Act, 22 U. S. C. §§ 611-621. Compare *N.A.A.C.P. v. Alabama*, 357 U. S. 449 (1958) and *Thomas v. Collins*, 323 U. S. 516 (1945).

3. Petitioners further contend that the registration provisions violate the First Amendment and the Due Process Clause "because they impose unjustifiable restraint on association." That part of the question which is before us now, whether the registration provisions alone place forbidden pressures on the freedom of association, has been answered by the Supreme Court in the negative.⁷

⁷ If the petitioners seek to pose the question "Whether Congress has power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the future or on the ground that it is ideology subservient to some foreign country," (taken from Justice Black's 1961 dissenting opinion, 367 U. S. at 147) the question is premature, as the 1961 majority opinion makes plain. For, according to that opinion, in the absence of any consideration of the sanctions attaching to a registration order, the statute does not "outlaw an association, group or party" (emphasis added); it is simply a regulatory statute. Thus the majority opinion did not consider the question posed, and we may not consider it until such time as the Act's sanctions are before us.

Appendix A—Opinion Below

4. Finally, it is suggested that the provisions constitute a bill of attainder "because the 1953 determinations as to the character of the Communist Party is made conclusive against petitioners." In the absence of any showing that circumstances have changed significantly since the Board's determination of the Party's status in 1953, we do not find it necessary to reexamine this issue here. See *National Council of American-Soviet Friendship, Inc. v. SACB*, — U. S. App. D. C. —, 322 F. 2d 375, 392 (1963); *Weinstock v. SACB*, — U. S. App. D. C. —, — F. 2d — (No. 13,422, decided Dec. 17, 1963) (concurring opinion); *Flynn v. Rusk*, 219 F. Supp. 709, 713 (D. D. C. 1963) (cert. granted); cf. *Communist Party v. SACB*, 367 U. S. at pp. 82-88; *Jefferson School of Social Science v. SACB*, — U. S. App. D. C. —, — F. 2d — (No. 12,876, decided Dec. 17, 1963). Also see, footnote 6, *supra*.

The orders of the Board in these cases are

Affirmed.

BASTIAN, *Circuit Judge*, concurs in the result.

Appendix B—Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963.

— o —

No. 17,492

WILLIAM ALBERTSON,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

— o —
No. 17,623

ROSCOE QUINCY PROCTOR,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

— o —

**On Petitions for Review of Orders of the Subversive
Activities Control Board.**

Before:

BAZELON, *Chief Judge*, and

BASTIAN and MCGOWAN, *Circuit Judges*.

JUDGMENT

**These cases came on to be heard on the records from
the Subversive Activities Control Board, and were argued
by counsel.**

Appendix B—Judgment Below

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Subversive Activities Control Board on review in these cases are hereby affirmed.

Per CIRCUIT JUDGE MCGOWAN.

Dated: Apr. 23, 1964.

Circuit Judge BASTIAN concurs in the result.

Appendix C—Statutes and Regulations Involved

1. Subversive Activities Control Act

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

Sec. 4.(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

• • •

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

• • •

Sec. 7.(a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form pre-

Appendix C—Statutes and Regulations Involved

scribed by him by regulations, as a Communist-action organization.

* * *

(c) The registration required by subsection (a) or (b) shall be made—

* * *

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

* * *

(4) In the case of a Communist-action organization, the name and last known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

Sec. 8.(a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a

Appendix C—Statutes and Regulations Involved

Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

• • •

Sec. 13.(a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

• • •

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

• • •

(2) that an individual is a member of a Communist-action organization (including an organization

Appendix C—Statutes and Regulations Involved

required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

* * *

Sec. 14.(a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

* * *

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

Sec. 15.(a) If there is in effect with respect to any organization or individual a final order of the Board re-

Appendix C—Statutes and Regulations Involved

quiring registration under section 7 or section 8 of this Title—

• • •

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

2. Regulations of the Attorney General

Order No. 250-61, issued by the Attorney General on October 3, 1961, effective October 7, 1961, prescribing regulations to carry out the provisions of sections 7, 8, 9 and 10 of the Subversive Activities Control Act, 28 C. F. R. Part 11, provides in pertinent part as follows:

Section 11.206 Forms for registration of individuals.

Each individual required to register pursuant to section 8(a) or (b) of the act shall accomplish such registration on a form hereby designated as Form IS-52a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D. C., and may be obtained in person or by mail.

Section 11.207 Form for registration statement of individuals.

Registration statements of individuals shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D. C. Filing may

Appendix C—Statutes and Regulations Involved

be made in person or by mail and shall be deemed to have taken place upon receipt thereof. Such registration statement shall be on a form hereby designated as Form IS-52, copies of which are available at the Internal Security Division.

3. Forms Prescribed by the Attorney General

Form IS-52a is as follows:

Form No. IS-52a
(Ed. 9-6-61)

Budget Bureau No. 43-R414
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

REGISTRATION FORM FOR INDIVIDUALS

Pursuant to Section 8(a) or (b) of
the Internal Security Act of 1950

(NOTE: This form should be accompanied by a
Registration Statement, Form IS-52)

..... hereby
(Name of individual—Print or type)

registers as a member of,
a Communist-action organization.

/s/
(Signature) (Date)

.....
(Typed or printed name) (Date)

.....
(Address—type or print)

Appendix C—Statutes and Regulations Involved

Form IS-52 is as follows:

Budget Bureau No. 43-R301.2
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

FORM IS-52

for

REGISTRATION STATEMENTS OF INDIVIDUALS

Pursuant to section 8 of the Internal
Security Act of 1950

INSTRUCTION SHEET—READ CAREFULLY

1. All individuals required to register under section 8 of the Internal Security Act of 1950 shall use this form for their registration statements.
2. Two copies of the statement are to be filed. An additional copy of the statement should be prepared and retained by the Registrant for future references.
3. The statement is to be filed with the Internal Security Division, Department of Justice, Washington, D. C.
4. All items of the form are to be answered. Where the answer to an item is "None" or "inapplicable," it should be so stated.
5. Both copies of the statement are to be signed. The making of any willful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

Appendix C—Statutes and Regulations Involved

6. If the space provided on the form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the answer given.

FOR AN INDIVIDUAL:

a. Who is member of any Communist-action organization which has failed to file a registration statement as required by Section 7(a) of the Internal Security Act of 1950.

OR

b. Who is a member of any organization which has registered as a Communist-action organization under Section 7(a) of the Internal Security Act of 1950 but which has failed to include the individual's name upon the list of members filed with the Attorney General.

1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.

2.(a) Name of Registrant.

(b) All other names used by Registrant during the past ten years and dates when used.

(c) Date of birth.

(d) Place of birth.

3.(a) Present business address.

(b) Present residence address.

Appendix C—Statutes and Regulations Involved

4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:

(a) List all offices so held and the date when held.

(b) Give a description of the duties or functions performed during tenure of office.

The undersigned certifies that he has read the information set forth in this statement, that he is familiar with the contents thereof, and that such contents are in their entirety true and accurate to the best of his knowledge and belief. The undersigned further represents that he is familiar with the provisions of Section 1001, Title 18, U. S. Code (printed at the bottom of this form).*

/s/
(Signature) (Date)

/T/
(Name) (date)
(Print or type)

* 18 U. S. C., Section 1001, provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.



In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 265

**WILLIAM ALBERTSON AND ROSCOE QUINCY PROCTOR,
PETITIONERS**

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

**MEMORANDUM FOR THE RESPONDENT SUGGESTING THAT
THE CAUSE IS MOOT WITH REGARD TO PETITIONER
ALBERTSON**

The Attorney General brought this proceeding against petitioner Albertson by filing a petition with the Subversive Activities Control Board for an order requiring him to register as a member of a Communist-action organization, *i.e.*, the Communist Party. The petition alleged that: (1) a final order requiring the Communist Party to register under Section 7(a) of the Act as a Communist-action organization was in effect; (2) more than sixty (60) days had elapsed since the order became final, but the organization had not registered with the Attorney General; and (3) pe-

(1)

tioner was then a member of the Communist Party and was therefore required to register with the Attorney General under Section 8 of the Act, but had failed to do so (J.A. 2-5). The Board, after full hearing, found petitioner Albertson to be a member of the Communist Party and ordered him to register (J.A. 26). The court of appeals upheld the order.

Subsequent to the decision of the court of appeals, on July 7, 1964, the official Communist Party newspaper, "The Midweek Worker," announced that the New York State Communist Party had expelled petitioner Albertson "after a thorough investigation and on the basis of irrefutable evidence, that William Albertson has operated as a police agent * * *."

From this and other information, the government is satisfied that petitioner Albertson has in fact been expelled from the Communist Party in substance as well as form, and is therefore no longer a "member." Thus the factual basis of the order to register, which has not yet become final, has been eliminated. When circumstances have changed so that the moving party is no longer entitled to the relief which it seeks, only an abstract question is still presented for decision. In such a situation, which no case or controversy remains, the case is moot. *United States v. Alaska S.S. Co.*, 253 U.S. 113, 115-117.

We respectfully submit that the petition for a writ

¹The complete text of the article is set forth in the Appendix, pp. 4-5 below. Albertson denied the Party's allegations which were the basis for the expulsion. Whether the Party or Albertson is correct is immaterial to the question of mootness.

of certiorari with regard to petitioner Albertson be granted, the judgment of the court of appeals with regard to him be vacated, and the case remanded to that court with directions to vacate the order of the Board as moot.

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

AUGUST 1964.

APPENDIX

The Worker, JULY 7, 1964, p. 8

N.Y. COMMUNISTS DENOUNCE ALBERTSON AS INFORMER

The Communist Party of New York State, after a thorough investigation and on the basis of irrefutable evidence, has disclosed that William (Bill) Albertson has operated as a police agent within the ranks of the party. Assiduously covering up his nefarious activity, Albertson succeeded in attaining a position of trust and responsibility. With callous and malicious intent he violated the confidence entrusted in him to perform the role of stool pigeon and informer against those whom he called his comrades, his friends, men and women who are devoted fighters for peace, freedom and equality.

Because the facts accumulated remove every shadow of doubt that Albertson lived a life of duplicity and treachery—posing as a dedicated defender of the workers' interests while in actuality betraying them—the Communist Party of New York State has expelled him.

It should come as no shock to Communists that the ruling circles in the United States employ the tactic of infiltrating working class and people's organizations to cause dissention and disunity, to spread lack of confidence in their own strength and in leadership, hoping thereby to defeat the people's struggles. Thus, in addition to open reactionary assaults on the Communist Party and other people's organizations through imprisonment and persecutions, witch-hunts and economic pressures, and endless legal harassments and litigations, the ruling class attempts to penetrate

working class organizations. Clearly, the Communist Party, the most consistent champion of the people's welfare, would be chosen as a special target precisely because its policies and activities conform to the people's vital needs and aspirations and the fundamental interests of our nation.

The exposure of so highly-placed a police agent as Albertson is but another proof that the ruling class will not succeed. With courage and determination American Communists withstood the years of McCarthyism and are now heroically battling McCarranism. They will with the same loyalty and dedication overcome the momentary dislocation created by the activities of such an agent and provocateur as William Albertson.

In exposing and denouncing Albertson, the Communist Party of New York State has the full and unflinching support of its membership and of all democratic forces who have been confronted with the work of stool pigeons and informers in their own organizations.

WILLIAM L. PATTERSON.
ROBERT THOMPSON.

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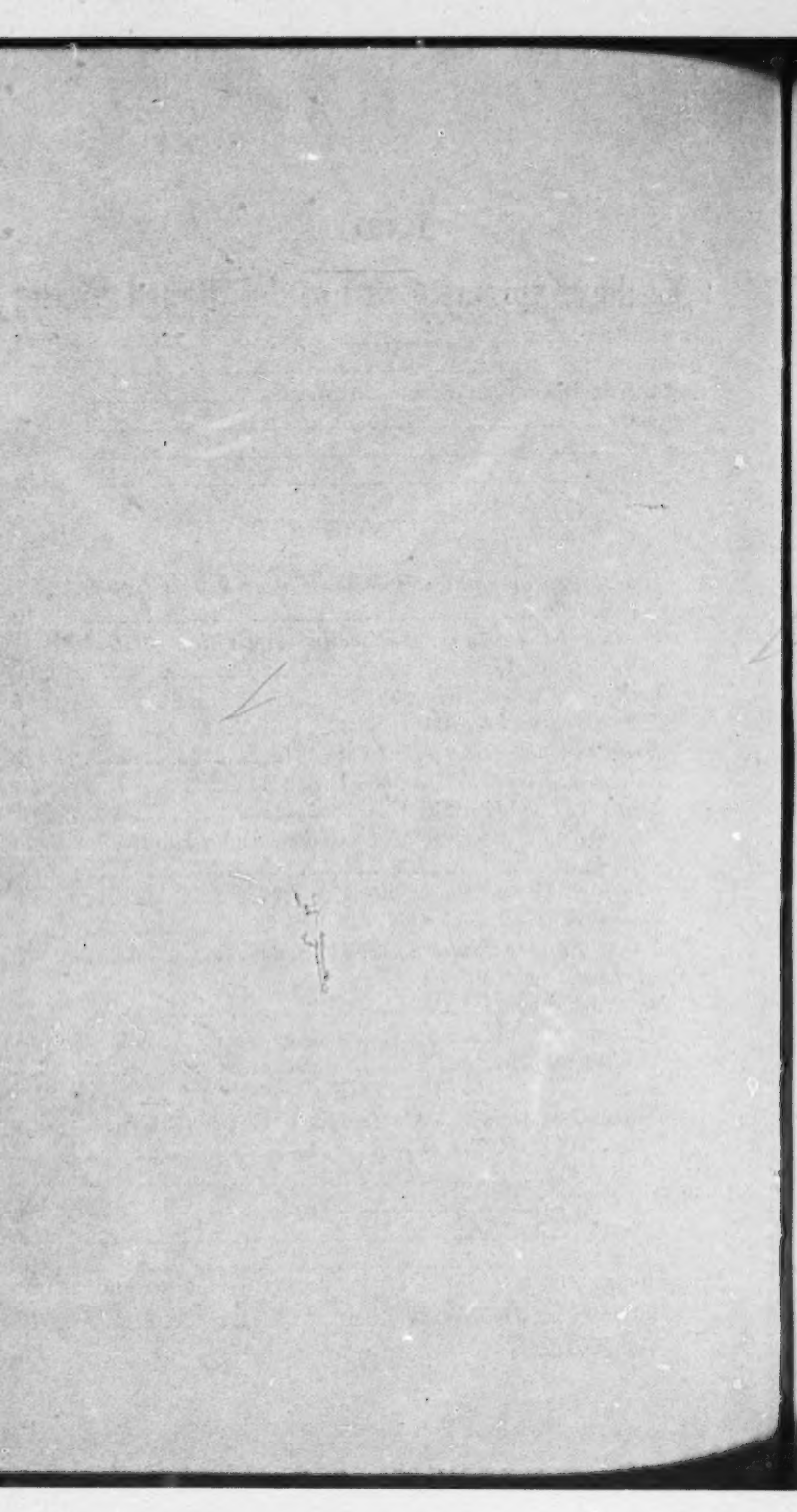
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 265

**WILLIAM ALBERTSON AND ROSCOE QUINCY PROCTOR,
PETITIONERS**

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUM-
BIA CIRCUIT**

**BRIEF FOR THE RESPONDENT IN OPPOSITION WITH REGARD
TO PETITIONER PROCTOR¹**

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 19-31) is reported at 332 F. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1964 (Pet. App. B, pp. 32-33). The petition for a writ of certiorari was filed on July 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The government is filing separately a "Memorandum for the Respondent Suggesting That the Cause Is Moot With Regard to Petitioner Albertson."

QUESTIONS PRESENTED

The Subversive Activities Control Act of 1950 provides for the registration of any member of an organization which has been found by the Subversive Activities Control Board to be a "Communist-action organization" and which itself has failed to register under the Act. The Communist Party has been found to be such an organization, but has not registered. Petitioner Proctor was found by the Board to be a member of the Communist Party and was ordered to register. The questions presented are:

(1) Whether the order directing petitioner to register violates his privilege against self-incrimination under the Fifth Amendment.

(2) Whether petitioner was denied the right to trial upon indictment, by a jury, and after judicial proceedings because these procedures were not afforded him concerning the issue whether the Communist Party is a "Communist-action organization" within the meaning of the Act.

(3) Whether petitioner was subjected to a bill of attainder or was denied procedural due process because he could not relitigate before the Board its prior finding as to the character of the Communist Party.

(4) Whether the registration provisions violate the First Amendment or substantive due process protected by the Fifth Amendment.

STATUTE, REGULATIONS, AND FORMS INVOLVED

The pertinent provisions of the Subversive Activities Control Act, 64 Stat. 987, 50 U.S.C. 781, *et seq.*, and

the registration forms prescribed by the Attorney General under it, are set forth in the Petition for Certiorari, App. C, pp. 34-42.

STATEMENT

The Attorney General began this proceeding against petitioner Proctor by filing a petition with the Subversive Activities Control Board for an order requiring him to register as a member of a Communist-action organization, *i.e.*, the Communist Party. The petition alleged that: (1) a final order requiring the Communist Party to register under Section 7(a) of the Act as a Communist-action organization was in effect; (2) more than sixty days had elapsed since the order became final, but the organization had not registered with the Attorney General; and (3) petitioner was a member of the Communist Party and was therefore required to register with the Attorney General under Section 8 of the Act, but had failed to do so (J.A. 30-32).

After full hearings—at which petitioner Proctor presented no evidence—the Board found that he had been a member of the Party at least since 1959² (J.A. 50). The Board also found that he had been elected to the National Committee at the national convention in 1959 and to the Northern California District Committee in 1960 (J.A. 49). The Board therefore ordered him to register. The court of ap-

² The Board in making its determination applied the definition of membership approved by this Court in *Killian v. United States*, 368 U.S. 231, 247.

peals upheld this order, as well as a similar order involving petitioner Albertson.²

ARGUMENT

The court of appeals was correct in refusing, as premature, to consider petitioner's claims that the Board's order violated his rights under the self-incrimination clause of the Fifth Amendment and that the Board's refusal to allow him to relitigate the status of the Communist Party as a Communist-action organization denied him the right to trial by jury, the right to an indictment, and a judicial trial. In any event, those claims, as well as petitioner's other contentions, are without substance on their merits.

1.a. In *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 105-110, this Court held, in a case involving an order of the Board directing a Communist-action organization to register under the Act, that the claim that such registration would require the organization's officers to incriminate themselves was premature even though a subsequent refusal to register might subject them to cumulative penalties. The Court explained that (*id.* at 107):

The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. * * * We cannot know now that the Party's officers will ever claim the privilege. * * * If a claim of privilege is made, it may or may not be honored by the Attorney General. We can-

² The parties in 21 other similar cases stipulated that the same judgment should be entered in those cases as the court of appeals entered in the *Albertson* and *Proctor* cases.

not, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue.

Petitioner argues that the situation here is different from the *Communist Party* case because the Party's officers were not parties to the action and no actual claim of privilege had been made by them. It is true that petitioner is the person who would be entitled to make the claim and that he asserted the claim before the Board and in the court below. However, until the order in this case becomes final, the claim is premature because petitioner is not yet under the compulsion of the criminal laws to register. At that time, he may or may not choose to register. If he refuses, the Attorney General, depending on the circumstances of the claim, may or may not honor the claim of privilege. In short, here, as in the *Communist Party* case, litigation of this question must await the time, if ever, when petitioner is actually compelled to register, refuses, and the government prosecutes him for such refusal.

b. Petitioner contends (Pet. 17-18) that he was denied the right to trial upon indictment, before a jury, and in full judicial proceedings because the Act does not afford him these procedures with regard to the question whether the Communist Party is a Communist-action organization. However, this issue is also premature. Petitioner has merely been ordered

by an administrative agency to register, in part on the basis of a previous administrative order. Before petitioner may be penalized for violating this order he is entitled under the Act to a full judicial criminal trial. Whether the Constitution requires that the character of the Communist Party be relitigated as one of the issues in such a trial—with of course all the protections of the Fifth and Sixth Amendments—may properly be determined if such proceedings are ever brought.⁴

2. In any event, the Act's provisions for the registration of members of groups determined to be Communist-action organizations, in the absence of registration by those organizations themselves are constitutional.

a. The Act does not unconstitutionally deprive petitioner of his Fifth Amendment privilege against self-incrimination. Section 4(f) of the Act provides that the fact of registration may not be used as evidence in any prosecution for violation of any criminal statute. As this Court's recent decision in *Murphy v. Waterfront Commission*, decided June 15, 1964, makes clear, a person may be required to give information that would otherwise incriminate him if the information cannot be used against him, even though he is not given complete immunity from prosecution. Since the purpose of Section 4(f) was to

⁴ As the court of appeals recognized, however (cf. Pet. App. A, p. 27, note 6, with Pet. App. A, p. 31), the issue whether petitioner was subjected to a bill of attainder or was denied procedural due process because he was not allowed to relitigate the character of the Communist Party before the Board is not premature. We discuss this issue at pp. 8-11 below on the merits.

meet criticism that the Act might be unconstitutional under the Fifth Amendment, it is clear that Section 4(f) also applies to prosecutions under other provisions of the Act itself, such as those involving employment and labeling of publications.

While Section 4(f) does not grant complete immunity in that it does not bar use of registration statements for leads to other evidence, such use assumes that the evidence was previously unknown. See *Heike v. United States*, 227 U.S. 131, 143. The evidence before the Board demonstrated that the Attorney General already had reason to believe that petitioner was a Party member. Since the mere fact of registration could not provide the Attorney General with any new leads, it could not incriminate petitioner. *Rogers v. United States*, 340 U.S. 367, 372; *Curcio v. United States*, 354 U.S. 118, 124.

Petitioner suggests (Pet. 9-10) that the answers to certain questions on the registration form would be incriminating. However, a person may not refuse to register or to answer any questions because some questions might incriminate him. *United States v. Sullivan*, 274 U.S. 259, 263; *United States v. Kahriger*, 345 U.S. 22, 32. If the member finds that answering a particular question in the registration statement might incriminate him, he can note his refusal to answer that question and thereby claim his privilege.⁵

⁵ Moreover, contrary to petitioner's suggestion (Pet. 10, 13), the registrant does not admit that the organization to which he belongs is a Communist-action organization. Indeed, that finding has already been made by the Board and is not even in issue in this proceeding or in any proceeding involving the disabilities under the Act. See below pp. 8-11.

b. Petitioner was not denied the right to an indictment, trial by jury, or a full judicial trial because he was not provided those procedures upon the issue whether the Communist Party is a "Communist-action organization" within the meaning of the Act. Nor was he subjected to a bill of attainder or denied due process because he was not allowed to relitigate the issue before the Board.

Petitioner's contention that he is entitled to a full criminal trial on this issue is inconsistent with basic principles of administrative law. Since the Board's order to register is of course not itself a criminal penalty, it can be imposed pursuant to an administrative hearing. When and if petitioner refuses to obey the order without legal reason (such as the Fifth Amendment), he will be tried for the crime of refusing to obey such an order. It will be irrelevant whether some error was committed in originally issuing the order; it will be enough that petitioner has failed to obey a final order. On this issue, petitioner will of course have the full protection of the Fifth and Sixth Amendments. But he will not be able to relitigate the validity of the order any more than can a person who violates an order of the Federal Trade Commission or Interstate Commerce Commission.

Petitioner was likewise not denied procedural due process by the Board's refusal to permit him to relitigate its earlier finding that the Party is a Communist-action organization. The requirement of personal registration does not turn on whether an organization is in fact a Communist-action organization. The Act provides that if a final order requires an organiza-

tion to register and it does not do so, members of the organization are required to register themselves. The only real issue concerning these requirements is whether, as a matter of substantive due process, members of organizations can be required to assume obligations of their organizations. We submit that, when, as this Court has held with regard to the Communist Party, an organization may properly be ordered to register, the obligation to register himself may be imposed on each member on the basis of this finding.

In addition, treating petitioner's argument as properly involving procedural due process, this Court has held that "due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." *Moyer v. Peabody*, 212 U.S. 78, 84. The tortuous history of the litigation in the *Communist Party* case (see 367 U.S. at 19-22) demonstrates the total impracticability of permitting in each case involving members of the Communist Party the relitigation of the status of the Party as a Communist-action organization.

Moreover, in the litigation resulting in the final order requiring it to register, the Communist Party may be fairly said to have represented its members. As this Court stated in *Hansberry v. Lee*, 311 U.S. 32, 42-43, "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * *, or where for any other reason the relationship between the parties present and those

who are absent is such as legally to entitle the former to stand in judgment for the latter." Accord, Re-statement, *Judgments* (1942), § 86. Regardless of the rule in the absence of statute, at the least Congress' determination to have the Communist-action organization alone litigate its own character under the Act is not so unfair as to violate due process.

There is no merit to petitioner's suggestion (Pet. 15-16) that he was entitled to relitigate the Party's present status because the Board's finding related to 1953. This Court implicitly rejected a similar contention in upholding the constitutionality of the non-Communist affidavit provision of the Labor Management Relations Act. *American Communications Assn. v. Douds*, 339 U.S. 382. That provision applied specifically to all members of the Communist Party, and there was no opportunity for members to litigate the character of the Party at the time of their failure to register. In view of the grave danger the Communist movement poses to national security and its secret and conspiratorial character, Congress could reasonably decide that once the Board had determined after full proceedings that a particular organization is a Communist-action organization, that finding is binding in subsequent proceedings to compel individual members of the organization to register. Moreover, Congress has provided a means by which the Communist Party itself can relitigate its status. Section 13(b) of the Act; see *Communist Party v. Subversive Activities Control Board*, *supra*, 367 U.S. at 87.

The fact that the Board's finding as to the Communist Party rested partially on the Party's activities before the passage of the Board does not make the Act a bill of attainder. As this Court stated in the *Communist Party* case, 367 U.S. at 86, "[T]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." The Court held that the Act was not an attainder as to the Communist Party because it was a regulatory statute which applied to present activities rather than to particular organizations or individuals. *Id.* at 83-88.⁶ Since the Court was fully aware that the Board's finding was based in part on activities which occurred before the Act was passed (see 367 U.S. at 29, 42-54, 69), this holding is controlling on petitioner's contention.⁷

c. In the *Communist Party* case, this Court held that the Act's provisions requiring the registration of Communist-action organizations, which includes listing their members, do not violate the First Amendment. 367 U.S. at 88-105. This holding fully

⁶ It is likewise clear that the Act is not an attainder as to petitioner. The order to register is not punishment, the Act does not name petitioner, and he is required to register only because he, unlike petitioner Albertson, has continued to be a member.

⁷ If the registration requirement is not invalid under the First Amendment which is the specific provision relating to the rights of speech and assembly, it is surely not invalid under the general provisions of the Fifth Amendment. See also the opinion of the court of appeals, Pet. App. A, pp. 28-29.

applies to the provisions relating to members of Communist-action organizations. Here, petitioner has been ordered to register because the Communist Party has not itself registered. If Congress has the power to compel the Party itself to register, it can compel its members to register when the Party does not act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari, insofar as it relates to petitioner Proctor, should be denied.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. [REDACTED]

3

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

MEMORANDUM FOR PETITIONERS (1) REPLYING TO
RESPONDENT'S OPPOSITION TO PETITION FOR
CERTIORARI AND (2) OPPOSING RESPONDENT'S
SUGGESTION THAT THE CAUSE IS MOOT WITH
REGARD TO PETITIONER ALBERTSON

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 265

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENT'S OPPOSITION TO
PETITION FOR CERTIORARI

1. The Privilege Issue and Prematurity

Contrary to its position in the court below (Pet. 7), the government argues (Opp. 5) that "until the order in this case becomes final," petitioner's claim of his privilege against self-incrimination "is premature be-

cause petitioner is not yet under the compulsion of the criminal laws to register.”¹

As soon as the registration order against petitioner becomes final, without any waiting period, petitioner must register or subject himself to imprisonment of five years and a fine of \$10,000 for each day of failure to register (Act, sec. 15(a)). Accordingly, if this Court, like the court below, refuses to adjudicate petitioner's claim of privilege—conceded by the lower court to be “not without force” (Pet. Appdx. A, p. 24)—petitioner can reassert and relitigate his privilege only by risking a lifetime of imprisonment. To force petitioner and others similarly situated to engage in such a desperate gamble for the vindication of their constitutional privilege makes the Fifth Amendment an unkept promise.

No such situation was present in *Communist Party v. S.A.C.B.*, 367 U.S. 1. As shown by the passage from that decision quoted in the Opposition (p. 4), adjudication of the privilege of the Party's officers was there held premature because, “We cannot know now that the Party's officers will ever claim the privilege.” Here, in contrast, the individual who may be entitled to the privilege has personally claimed it, as the government admits (Opp. 5), and his claim has been rejected (Pet. 7-8).

Whether the prematurity holding of the *Party* case, made by a bare majority, should be extended to the different circumstances here present is itself an important, substantial constitutional question which should be decided by the Court.

¹ The government's Opposition refers only to petitioner Proctor because it has suggested that petitioner Albertson's case has become moot. Our Opposition to the suggestion follows this Reply.

2. The Merits of the Privilege Claim

The government argues (Opp. 6-7) that "registration could not incriminate petitioner" because of the conjunction of two factors: (a) section 4(f) of the Act prohibits the "fact of registration" from being received in evidence against the registrant in specified criminal prosecutions, and (b) The "Attorney General already had reason to believe that petitioner was a Party member," so that "the mere fact of registration could not provide the Attorney General with any new leads."

In the Communist Party's appeal from its conviction for failing to register under the Act, the government made the identical argument in asserting that the Party's officers could not incriminate themselves by registration. The Court of Appeals, reversing the conviction, rejected the argument, and this Court denied the government's petition for certiorari. *Communist Party v. United States*, 331 F. 2d 807, 813, cert. den. 377 U.S. 968, sub nom. *United States v. Communist Party*.² It is beyond our comprehension how the government can contend that its rejected argument demonstrates that petitioner's Fifth Amendment claim does not present a substantial question on its merits.

For 72 years this Court has asserted that a limited immunity statute like section 4(f) cannot supplant the privilege in a federal proceeding because it does not

² The government's petition for certiorari in that case (No. 1027, Oct. Term, 1963, p. 2) included the following as a Question Presented: "2. Whether the Party's officers may, under the Fifth Amendment, refuse to register for the Party when they cannot possibly incriminate themselves because the statute prohibits any information obtained by registration from being introduced in evidence in a judicial proceeding and no new leads to other information can result since Party officers have publicly stated their positions."

accord a protection coextensive with the privilege. *Counselman v. Hitchcock*, 142 U.S. 547; *Brown v. Walker*, 161 U.S. 591, 594-95; *Hale v. Henkel*, 201 U.S. 43, 67; *United States v. Monia*, 317 U.S. 424, 428; *Smith v. United States*, 337 U.S. 137, 147; *United States v. Bryan*, 339 U.S. 323, 336; *Adams v. Maryland*, 347 U.S. 179, 182; *Scales v. United States*, 367 U.S. 203, 210. No case has said that an exception exists if the government already has "reason to believe" the existence of the incriminating fact, nor has any court, in applying *Counselman*, inquired into the information possessed by the government. To the contrary, the Court has applied the rule so as to vindicate claims of privilege, despite statutes of the 4(f) type, even though the record showed that the government already had the information which it sought to elicit from the witness. See, e.g., *Emspak v. United States*, 349 U.S. 190, 200. Moreover, if the government's suggested exception were the law, the existence of a limited immunity statute would prevent persons from knowing when they could rightfully claim their privilege, since the right would depend on facts outside their knowledge, what the government has "reason to believe" about them.

We believe that the government is mistaken in supposing (Opp. 6) that the *Counselman* doctrine was devitalized *sub silentio* by *Murphy v. Waterfront Commission*, 378 U.S. 52 (see Pet. 10, ft. 6). But if there is any basis for the government's supposition, surely the question is a substantial one which needs to be decided by the Court.

In any event, the government's proposed revision of the *Counselman* rule is not applicable to the present case.

First, the government's evidence and the Board's findings as to petitioner Proctor's membership in the Communist Party related to past membership.⁸ Yet the Board's order, if it becomes final, will require him to make by self-registration the incriminating admission of Communist Party membership in the present, at a time several years later than the period to which the evidence and the findings relate (see Act, sec. 8(a); Registration Form 15-52a, Pet. Appdx. C, p. 39).

Second, section 4(f) does not preclude all evidentiary use of the incriminating statements made by registration. As our Petition pointed out (p. 10), section 4(f) by its terms does not protect a registrant against the receipt in evidence of the registration documents (1) to prove incriminating admissions in the documents other than the admission of Communist Party membership or officership, and (2) to prove the registrant's Communist Party membership in criminal prosecutions for violating the employment or labelling provisions of sections 5 and 10 of the Act. The government says of the second branch of this point (it overlooks the first) that section 4(f) should applied to prosecutions for violations of sections 5 and 10 because "the purpose of Section 4(f) was to meet criticism that the Act might be unconstitutional under the Fifth Amendment" (Opp. 7). But as *Scales v. United States*, 367 U.S. 203, 216, points out, the proponents of the Act took a "narrow view of the self-incrimination problem," and the legislative history (*Scales* at 211-219) shows that Congress was niggardly in the immunity it

⁸ The latest activity relied on by the Board as evidence of Proctor's Communist Party membership was in March 1962 (R. 44-49). The latest such activity in petitioner Albertson's case was in July 1962 (R. 16-24).

was willing to extend to registrants despite repeated warnings that its action would be constitutionally insufficient. Hence there is here no more basis than in *Scales* for extending section 4(f) beyond its language.

Third, if the registration order becomes final, petitioner will be obliged further to incriminate himself by answering the questions on the "Registration Statement" (Form IS-52, Pet. Appdx. C, p. 40), as well as by executing the "Registration Form" (Form IS-52a, Pet. Appdx. C, p. 39). The government claims (Opp. 7) that only some of the questions on the Statement call for possibly incriminating information. But the fact is that except for petitioner's name, which the government already knows, every item on the Registration Statement calls for a potentially incriminating answer.⁴

⁴ The Registration Statement calls for all names used by the registrant in the previous ten years and for the Party offices which he held in the preceding year. Such information is obviously incriminating and indeed is sought for no other purpose. The date and place of the registrant's birth is identifying information which, especially in combination with the demand for aliases, can be used to link the registrant with claimed criminal conduct. If the registrant is an alien or naturalized citizen the information as to nativity may also be used to support efforts to deport or denaturalize him. Finally, the Registration Statement, like the Registration Form, requires an admission that the Communist Party is a Communist-action organization. Since by definition (Act, secs. 2 and 3(3)), such an organization is a participant in an international criminal conspiracy, that admission is plainly incriminating under section 4(a) of the Act and the Smith Act. The government's statement (Opp. 7 fn. 5) that a "registrant does not admit that the organization to which he belongs is a Communist-action organization" is belied by the plain language of the registration documents and of section 8(a).

3. The First Amendment and Substantive Due Process

Communist Party v. S.A.C.B., 367 U.S. 1, 88-105, held that section 7(d) of the Act, requiring a Communist-action organization to file its membership list with the Attorney General, does not violate the First Amendment. The case recognized that the members had a First Amendment interest in preserving the privacy of their political association, but held this interest outbalanced by the government's security interest in obtaining the disclosure.

As we pointed out (Pet. 11), the government has no such interest in ordering members to register themselves following Board hearings. In those cases, identification of the person as a member and disclosure of his membership are accomplished by the Board's findings. Accordingly, compulsory self-identification of a member by registration thereafter is superfluous to any disclosure objective and is a purposeless exaction of self-defamation and submission to a government-prescribed viewpoint (Pet. 12-13).

The government's Opposition is unable to suggest any governmental purpose which can be served by requiring a member to register, and thereby degrade, himself after the Board has found and disclosed his membership. Instead, the government is oblivious to the issue. It asserts that the holding in the *Party* case "fully applies" (Opp. 11-12), while ignoring the key distinction that Party registration serves a disclosure function whereas member registration does not.

4. Denial of Judicial Trial and Procedural Due Process; Attainder

(a) The government is similarly unresponsive to our contention (Pet. 17-18) that the Act unconstitutionally denies petitioner a trial by jury and a judicial trial on two issues: (a) whether the Communist Party is a Communist-action organization and (b) whether petitioner is a member of the Party.

The government first says (Opp. 5-6) that the contention is premature and must await adjudication in a criminal prosecution for non-compliance with the registration order.⁵ But the government studiously ignores our argument (Pet. 17-18) that under the doctrine of *Ex Parte Young*, 209 U.S. 123, petitioner is constitutionally entitled to adjudicate his claims in a civil proceeding before incurring the enormous cumulative criminal penalties which the Act visits on those who violate a registration order.

On the merits of the point, the government professes to see no distinction between the situation here and standard procedure for enforcing administrative orders (Opp. 8). The government overlooks the critical differences, thereby avoiding the necessity of dealing with *United States v. Spector*, 343 U.S. 169, 174 *et seq.*, and *Wong Wing v. United States*, 163 U.S. 288 (cited Pet. 17). The order here is an exercise of adjudicative, as distinguished from rule-making, power. It is enforced by criminal penalties for non-compliance, not by a civil procedure as with orders of the Federal Trade or Interstate Commerce Commis-

⁵ The government makes this statement only with regard to the first of the two issues mentioned in the preceding paragraph. It fails or refuses to recognize that our contention also applies to the second issue.

sion. As shown by Justice Jackson's opinion in *Spector* and by *Wong Wing*, a finding made in an administrative adjudicative proceeding may not be made conclusive in a criminal proceeding for violation of the administrative order, where the finding is, as here (Pet. 32), a constitutional prerequisite to the validity of the order. Thus the government acknowledges a fatal flaw when it agrees (Opp. 8) that in a criminal prosecution for failure to register the defendant will be bound by the Board's determination of the character of the Communist Party. A like flaw exists in the fact that the defendant will also be bound by the Board's administrative determination that he is a member of the Party.

(b) Petitioner was also held bound in the Board proceeding itself by the Board's prior determination that the Communist Party is a Communist-action organization. We argued (Pet. 14-16) that this preclusion of petitioner is unconstitutional because (a) the determination was made in a proceeding to which petitioner was not a party, and (b) the Board determination related to 1953, whereas petitioner was bound as to the character of the Party in 1962. The government concedes that this point is not premature (Opp. 6, ftn. 4) and admits (Opp. 8-9) that petitioner was so bound.

The government argues (Opp. 9) that this procedure "is not so unfair as to violate due process" (Opp. 10) because "the Communist Party may be fairly said to have represented its members" (Opp. 9). The government cites *Hansberry v. Lee*, 311 U.S. 32, 42-43, and *Restatement, Judgments* (1942) § 86, which state that a judgment in an action which meets the requirements for class actions may, consistently with due process, bind all the members of the class. The proceedings

against the Party, however, lacked all the essentials of a class action. It was not brought against the Party as the representative of its members, nor were any members joined to represent the class; the Party did not purport to defend the proceeding on behalf of the members; and nothing in the Act or the Board's rules would have permitted a member to participate in the proceeding by intervention or otherwise. See *Restatement, Judgments*, at 418; Fed. Rules Civ. Proc. 23, 24.

Even if the *Party* case had been a class action, there would still be the problem that what was there decided was the nature of the Party in 1953, whereas petitioner was precluded as to the Party's nature in 1962. The government considers this circumstance reasonable, stating (Opp. 10) that the Act provides "a means by which the Communist Party itself can relitigate its status." But the government ignores the facts, pointed out in our Petition (p. 15), that the Act does not permit an unregistered organization to relitigate its status and that the Communist Party, asserting constitutional rights not disposed of in the prior litigation against it, has not registered.

OPPOSITION OF PETITIONER ALBERTSON TO SUGGESTION THAT THE CAUSE IS MOOT WITH REGARD TO HIM

Petitioner Albertson has instructed counsel to oppose the government's suggestion that the cause is moot as regards him.

The government quotes an announcement in *The Worker* of July 7, 1964, that the New York State Communist Party expelled Mr. Albertson on the ground that he "has operated as a police agent within the ranks of the party." It represents that from this

article and other, undisclosed information, the government is satisfied that Mr. Albertson is "no longer a 'member'" of the Communist Party, so that "the factual basis of the order to register, which has not yet become final, has been eliminated."

Mr. Albertson has heretofore, in the exercise of his privilege against self-incrimination, refused to admit or deny membership in the Communist Party. Since he wishes to preserve his claim of privilege, he obviously cannot comment herein on the accuracy of the government's representation that he is "no longer" a member of the Communist Party. Mr. Albertson does, however, categorically deny that he is or ever has been a police agent or informer.

If Mr. Albertson has been expelled by the New York State Communist Party, that would not moot his case for three reasons.

(a) Under the national Constitution of the Communist Party, a member who has been expelled by his State organization has a right to appeal to the National Committee of the Party and thence to the National Convention. The government does not assert that this appeal procedure has been exhausted.

(b) The Act does not contemplate that a person who has been ordered to register as a member of the Communist Party is relieved of the registration obligation by a termination of his membership before the order becomes final. On the contrary, the liability to register does not depend on whether the individual is or ever was a member of the Communist Party. It depends only on whether the Board found him to be a member at the time of the administrative proceeding, and, if the case is taken to judicial review, whether the finding is supported by a preponderance of the evidence. Ob-

viously a finding can be so supported and still be contrary to fact.

In short, "the factual basis of the order to register" is not Party membership but a finding of such membership, and the finding is always of membership at a time preceding the registration. This "factual basis" has not been eliminated as to petitioner Albertson, whether or not he is presently a member of the Communist Party.

Absent publication of an expulsion in *The Worker*, the government would be the first to reject a request that a registration order be vacated because the individual is no longer, or never was, a member of the Communist Party. And we doubt that the government would have taken its present position if the expulsion announcement had come after this case were over so that considerations of litigation strategy would not be present.

(c) Petitioner Albertson has challenged the member registration provisions of the Act on the grounds that they invade his constitutional rights. If he was once but is not now a member, nevertheless the Act's provisions make it dangerous for him to seek reinstatement and thus continue to interfere with his freedom of choice and the exercise of his constitutional right of association.

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IN THE
Supreme Court of the United States
October Term, 1965

No. 3

WILLIAM ALBERTSON and ROSCOE
QUINCY PROCTOR,
Petitioners,
v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

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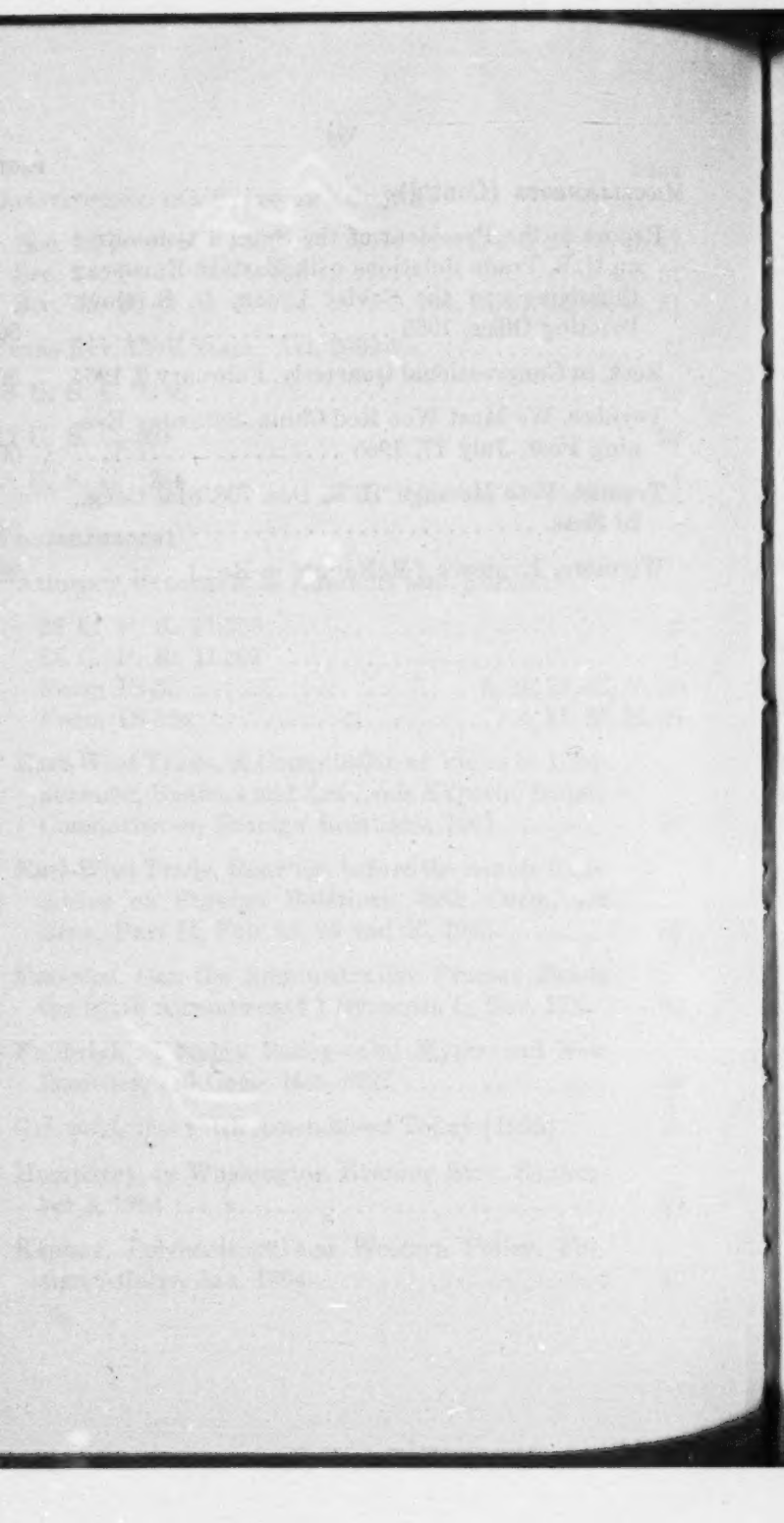
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IN THE
Supreme Court of the United States

October Term, 1965

No. 3

WILLIAM ALBERTSON AND ROSCOE QUINCY PROCTOR,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 62) is reported at 332 F. 2d 317.

Jurisdiction

The judgment below (R. 74) was entered on April 23, 1964. The petition for certiorari was filed on July 10, 1964, and was granted on May 17, 1965 (R. 75). The jurisdiction of this Court is conferred by section 14(a) of the Subversive Activities Control Act, 64 Stat. 1001, 50 U. S. C. 793, and 28 U. S. C. 1254.

Statute and Regulations Involved

The pertinent provisions of the Subversive Activities Control Act and the regulations and registration forms prescribed by the Attorney General are set forth in Appendix A, *infra*.

Questions Presented

The judgment below affirmed orders of the Subversive Activities Control Board (herein called the Board) requiring petitioners to register with the Attorney General pursuant to section 8 of the Subversive Activities Control Act (herein called the Act) as members of "the Communist Party of the United States of America, a Communist-action organization." The questions presented are:

1. Whether the court below erred in refusing to adjudicate petitioner's claims that they are protected by the privilege against self-incrimination from being compelled to register pursuant to section 8 of the Act.

2. Whether the member registration requirements of the Act and the Board's registration orders violate the privilege of petitioners against self-incrimination.

3. Whether the member registration requirements of the Act, on their face and as applied, violate due process and the First Amendment because they serve no governmental purpose, are irrational, compel self-defamation, and abridge freedom of belief, conscience and association.

4. Whether the member registration requirements of the Act, on their face and as applied, violate due process and the prohibition against bills of attainder because they apply to persons whose membership has been terminated and because they make the Board's 1953 determination that the Communist Party was a Communist-action organization conclusive as to the present character of the Communist Party.

5. Whether the member registration requirements of the Act unconstitutionally deny petitioners the safeguards of indictment by grand jury, trial by jury and judicial trial because they make the findings of the Board that petitioners were members of the Communist Party and that the latter was a Communist-action organization conclusive upon petitioners in prosecutions for their failure to register.

Statement of the Case

This case brings to the Court for the first time the constitutionality of the provisions of the Act requiring self-registration of persons found to be members of a Communist-action organization.

The Act

The Act defines a Communist-action organization as one which is directed, dominated or controlled by the foreign government controlling the world Communist movement and which operates to advance the objectives of that movement (sec. 3(3)). The Act finds that there exists a world Communist movement, controlled by the Communist dictatorship of an unnamed foreign country, which seeks by criminal and other means to overthrow existing governments and establish in all countries Communist totalitarian dictatorships subservient to the controlling foreign dictatorship (sec. 2).

The Act authorizes proceedings before the Board, on petition of the Attorney General, for a determination that an accused organization is a Communist-action organization and for an order requiring it to register as such with the Attorney General (secs. 7, 13). An organization which is ordered to register must accompany its registration with a registration statement containing, among other things, a list of its members (sec. 7(d)).

Section 8 of the Act provides that if an organization fails to register within thirty days after an order that it

do so becomes final,¹ the individual members shall register as such with the Attorney General. Members incur no penalties for failing to register at this point. However, section 13 authorizes the Board, on petition of the Attorney General, to find that an accused individual is a member and to order him to register under section 8. An individual who fails to register in obedience to a final order of the Board is punishable by imprisonment for five years and a fine of \$10,000, both cumulative for each day that the failure continues (sec. 15(a)).

The registration of an individual must be accompanied by a registration statement containing such information as the Attorney General may prescribe (sec. 8(c)). All registration statements are open to public inspection (sec. 9). Failure to file the statement is punishable by imprisonment for five years and a \$10,000 fine (sec. 15(a)).

Regulations of the Attorney General provide that the registration of an individual shall be accomplished by signing and filing a form (Form IS-52a) stating that the registrant "hereby registers as a member of _____, a Communist-action organization." The registration statement prescribed by the regulations consists of a separate form (Form IS-52) calling for the registrant's name, all other names used by him during the past ten years, the date and place of his birth, the name of the Communist-action organization of which he is a member, and a list and description of the duties of all offices in the organization held by him during the preceding year. See Appendix A, *infra*, for these regulations and forms.

The Communist Party Case.

On November 22, 1950, the Attorney General petitioned the Board for an order requiring the Communist Party to

¹ Board orders become final on the exhaustion of judicial review (sec. 14(c)).

register under section 7 as a Communist-action organization. After an administrative hearing, the Board issued the desired order on April 20, 1953. In its accompanying Report, the Board found that the unnamed foreign government referred to in sections 2 and 3(3) of the Act was the Soviet Union. After extensive litigation, the order was eventually sustained in *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1 (hereafter called the *Communist Party* case),² but with various questions reserved, including whether the order can constitutionally be enforced. The order became final on October 20, 1961.³ The Communist Party has not registered in compliance with the order, and has twice been indicted for its failure to do so. In the criminal proceedings, which are still pending, the Party maintains that the registration order cannot constitutionally be enforced against it.⁴

² The history of the litigation is summarized in the *Communist Party* case at 19-22.

³ Under section 14(b) of the Act, the order became final ten days after issuance of the Court's mandate. The mandate issued on October 10, 1961, following denial of a petition for rehearing. 368 U. S. 871.

⁴ In December, 1962, the Communist Party was convicted in the District of Columbia on an indictment, returned a year earlier, charging failure to register on each of eleven days in 1961 and to file a registration statement. The Court of Appeals reversed the conviction with instructions to enter a judgment of acquittal unless the government requested a new trial where it could attempt to meet its burden of proving the availability of someone who was willing to sign and submit the registration documents on behalf of the Party. *Communist Party v. United States*, 331 F. 2d 807, cert. den. sub nom. *United States v. Communist Party*, 377 U. S. 968. In December, 1964, the government moved in the District Court for a new trial which was scheduled for March, 1965. On February 25, 1965, a second indictment was returned charging the Party with failure to register on each of eleven days in 1965 and to file a registration statement (Cr. No. 202-65, D. C. Dist. Col.). On motion of the government, and over the defendant's opposition, the two indictments were consolidated for trial, and the trial was postponed until October, 1965.

The proceedings against petitioners.

On May 31, 1962, the Attorney General instituted a separate Board proceeding against each petitioner for an order requiring him to register as a member of the Communist Party. The petitions of the Attorney General alleged that the Communist Party had not complied with the final registration order against it, that petitioners were members of the Communist Party, and that they had not registered as such (R. 2, 30).

Each petitioner filed a sworn answer in which he alleged that sections 8 and 13 of the Act, on their face and as sought to be applied, violate his privilege against self-incrimination, which he thereby asserted. The answers also denied that the Communist Party is a Communist-action organization and declined, in reliance on petitioners' constitutional privilege, to answer the allegations of the petitions that they were members of the Communist Party (R. 5, 33).⁵

At the hearings,⁶ the Board took official notice of the proceedings which culminated in the final registration order against the Communist Party. It was stipulated that the Communist Party had not registered under the Act and that petitioners had not registered as members of the Communist Party (R. 13-16, 41-43, 53-54).

The Attorney General's evidence consisted of the testimony of paid F. B. I. informers that petitioners had participated in meetings of the Communist Party and had been elected to Party offices (R. 10-11, 16-24, 38-39, 44-49). Petitioners offered no evidence (R. 8, 37).

⁵ Under the Board's regulations, these claims of privilege operated as denials of the allegations to which they were addressed. (R. 8, 36).

⁶ The Board conducted separate proceedings for each petitioner. However, there is no material difference between them. Albertson's hearing was held before the Board in September, 1962 (R. 8). Proctor's hearing was held before a Board member in November, 1962 (R. 37).

The Board issued reports and orders finding each petitioner to be, and ordering him to register as, "a member of the Communist Party of the United States of America, a Communist-action organization" (R. 25-26, 57-58). The order against Albertson was issued on October 29, 1962 (R. 26) and that against Proctor on January 18, 1963 (R. 58).

No evidence was adduced at the hearings, and the Board made no findings, that petitioners had engaged in unlawful conduct, had advocated the violent overthrow of the government even as a matter of abstract doctrine, or had knowledge of such conduct or advocacy by the Party. There was no evidence, and the Board made no findings, that petitioners know or believe that the Party is or has any of the characteristics of a Communist-action organization. The Board held that petitioners were bound in the proceedings against them by the Board's 1953 determination that the Communist Party was a Communist-action organization (R. 13-14, 53-54).

In their petitions for review by the court below, petitioners again claimed the privilege against self-incrimination (R. 28, 60) which they had earlier asserted in their answers.⁷

The court below affirmed the Board's orders. It held (R. 69) that adjudication of the privilege issue must await prosecution of petitioners for non-compliance with the registration orders, and that consideration of the remaining constitutional issues⁸ was either likewise premature or

⁷ The Board has issued reports and registration orders like those involving petitioners against 34 other persons (and against another who has died), all of whom similarly claimed their constitutional privilege. These cases are pending in the court below where they are being held on stipulations to abide the result in this case and to be disposed of in accordance with the judgment that is ultimately entered herein. Seven similar cases are pending at the Board level.

⁸ Petitioners abandoned the non-constitutional issues raised in their petitions for review (R. 28, 60).

was foreclosed by this Court's decision in the *Communist Party* case.

In response to the petition for certiorari, the government filed a suggestion stating that petitioner Albertson had been expelled from the Communist Party after issuance of the registration order against him and that his case is moot. No action was taken on the suggestion when certiorari was granted. Counsel are authorized to state that it remains petitioner Albertson's position, for the reasons given in his opposition to the government's suggestion, that the cause is not moot as to him and hence should be disposed of in like manner with respect to both petitioners.

Summary of Argument

I.

A. Petitioners' claims of their constitutional privilege against being compelled to register under the Act require adjudication in this proceeding.

The claims of privilege were made in petitioners' answers in the Board proceeding and were reiterated in their petitions for review in the court below. The claims were rejected by the Attorney General in continuing to prosecute the administrative proceeding and by the Board in issuing the registration orders. They were again rejected in the Board's brief in the court below, not as inadequate or premature but as lacking in constitutional merit.

If the Board orders become final, petitioners will immediately be subject to severe cumulative penalties for failure to register. Accordingly, this proceeding affords them the last opportunity to vindicate their constitutional protection against compulsory self-incrimination.

The court below held that, under the *Communist Party* case, adjudication of petitioners' constitutional claim must

await their prosecution for violating the registration orders. However, analysis of that decision shows that none of the factors which led the Court to decline adjudication of the privilege of the officers of the Communist Party is present in this proceeding.

The privilege issue is not premature because of the remote possibility that the Attorney General might change his mind and honor petitioners' claims of privilege. If that were a reason for judicial abstention, jurisdiction would never exist to enjoin enforcement of an unconstitutional statute.

Nor is the issue premature because, as the government argues, petitioners may "choose" to register if the registration orders are affirmed. Registration after affirmation of the orders can no longer be a matter of free choice, since petitioners will be under the compulsion of threatened intolerable punishment. It is such compulsion that the Fifth Amendment prohibits.

The decision below conflicts with the rule of *Ex Parte Young* that where disobedience of an administrative order is punishable by severe cumulative penalties, due process requires the availability of a civil remedy to test the constitutionality of the order.

Finally, further delay in adjudicating the privilege issue is unreasonable and unfair, especially because it is intimately related to First Amendment freedoms.

B. The Act, the registration orders and the registration documents require petitioners to admit membership in the Communist Party. The admissions are incriminating under the Smith Act, section 4(a) of the Act and state statutes and are also within the protection of the privilege because they expose petitioners to forfeitures.

The registration documents require other incriminating admissions, including the admission that the Communist

Party is a Communist-action organization and a listing of aliases, offices held in the Communist Party and identifying information.

C. Section 4(f) does not supplant the privilege.

The first sentence of the section merely gives immunity from prosecution for membership in the Communist Party *per se* but not for offenses in which membership is but one of several ingredients.

The second sentence bars evidentiary use against a registrant of the fact of his registration as a member but does not bar his prosecution for offenses related to his membership. Under *Counselman v. Hitchcock*, only such absolute immunity can supplant the privilege.

The rule of *Counselman* is not inapplicable because, as the Board proceedings demonstrated, the Attorney General had reason to believe that petitioners were members of the Communist Party. *Counselman* admits of no exception for cases in which the government is already in possession of the incriminating information the disclosure of which it seeks to compel. Such an exception would serve no purpose, since it permits an incriminating admission to be compelled only if useless—i.e., if it cannot be introduced in evidence and provides the prosecutor with no leads he does not already have.

The argument that an incriminating admission may be extorted on condition that it is valueless is reminiscent of the discredited proposition that the admission in evidence of a coerced confession does not vitiate a conviction where other proof of guilt made use of the confession superfluous. Furthermore, the argument proves too much since it would cover *every* case in which the privilege is invoked. This is so because, even in the absence of a statute of the 4(f) type, the Fifth Amendment prohibits the evidentiary use against a person of an incriminating admission which he was compelled to make after claiming his privilege. Yet,

it has never been considered relevant to the validity of a claim of privilege that the government already had the information it sought to elicit from the witness. And it has made no difference in this respect that the privilege was claimed in a proceeding to which a statute of the 4(f) type was applicable.

Murphy v. Waterfront Commission has not modified the rule that Congress cannot supplant the privilege by anything less than a grant of absolute immunity.

The contention that section 4(f) supplants the privilege erroneously assumes that 4(f) prohibits the evidentiary use of the fact of a person's registration as a Communist Party member in *any* criminal proceeding against him. Both the text and the legislative history of the section show that 4(f) does not apply in prosecutions for violating the employment and labeling provisions of sections 5 and 10 of the Act. Moreover, it does not apply to forfeitures. Finally, the section does not bar the evidentiary use against a registrant of the incriminating admissions required by the registration documents in addition to the admission of Party membership.

II.

The *Communist Party* case sustained the Act's requirement that a Communist-action organization furnish the Attorney General a list of its members on the ground that such compulsory disclosure is a reasonable security measure. But where, as here, the Board has already found individuals to be Party members, the requirement that they register as such serves no disclosure function. Nor does it serve any other governmental purpose. It is therefore an arbitrary exertion of governmental power prohibited by due process.

The 8(c) requirement that registrants file a registration statement falls with 8(a), on which it depends. Moreover, since the information to be supplied under 8(c) is

not defined by the Act, the section serves no legitimate governmental purpose, and is invalid as an excessive delegation of legislative power and as authorizing an exploratory search.

The member registration requirement compels a person to register as a member even though his membership has terminated by the time the order that he register becomes final. Thus, it is not a regulation of future membership in a Communist-action organization but an inescapable punishment for past membership. Hence, it is a bill of attainder.

III.

The Act and the registration orders, by exacting declarations from petitioners, violate the First Amendment in two respects.

A. At a minimum, the First Amendment demands some valid governmental reason for ordering a person to make a prescribed declaration or lose his liberty. The requirement that persons found by the Board to be members of the Communist Party declare themselves to be such serves no governmental purpose and would therefore violate the First Amendment even if the declaration were innocuous.

The declaration exacted by a registration order is far from innocuous. It signifies acceptance of repugnant political beliefs and entails self-defamation and foreswearing.

B. The First Amendment invalidates restraints on membership in the Communist Party which are not necessary to prevent a substantive evil within the competence of Congress. The member registration requirement imposes a restraint on membership in the Communist Party without regard to the knowledge or intent of the member or the nature of his activity in the organization. Accordingly, the requirement violates the First Amendment by abridging the freedom of association of "the member for

whom the organization is a vehicle for the advancement of legitimate aims and policies." Moreover, the abridgment serves no governmental interest.

IV.

The Board ruled that petitioners were concluded by the Board's prior determination in the proceeding against the Communist Party that the latter was a Communist-action organization. The ruling violates procedural due process and the prohibition against a bill of attainder in two respects.

A. The ruling bound petitioners by the Board's evidentiary findings, made in a proceeding to which they were not parties, of the nature and control of the Communist Party. This procedure violates the due process principle that persons may not be deprived of liberty without a hearing and opportunity to contest the factual premise on which the validity of the deprivation depends.

This due process defect is aggravated by the fact that the determination of the Board which concluded petitioners was made in 1953. A conclusive presumption that a state of facts, once found to exist, will continue in perpetuity is plainly arbitrary. Yet the Act does not permit petitioners or the Communist Party to secure an adjudication of the current validity of the 1953 determination.

The Board's orders not only violate procedural due process but constitute bills of attainder. In the words of the *Communist Party* case, they attach "to the past and ineradicable actions of an organization" and are not "made to turn on continuously contemporaneous fact."

B. The Board also ruled that petitioners are bound by its decision in the Party proceeding that the Soviet Union was the foreign power, referred to in section 2, which controls a monolithic world Communist movement. In the *Party* case, the Court held that in the event of changed

circumstances the Board or a reviewing court could conclude that the world Communist movement described in section 2 no longer exists. It was only because of this power to construe section 2 in the light of contemporary fact that the Act was held not to offend due process.

It is recognized today that the section 2 description of Communism as a monolithic movement under iron Soviet control is anachronistic. By foreclosing consideration of this fact, the Board's ruling makes the Act violative of due process and a bill of attainder.

V.

The Act makes the Board's findings that petitioners are members of the Communist Party and that the latter is a Communist-action organization conclusive in prosecutions of petitioners for failing to register in obedience to the Board's orders. Thus, determination of the facts which are constitutionally prerequisite to the punishment of petitioners for failure to register is severed from the criminal proceeding and made administratively. Moreover, the determination is made on the basis of a mere preponderance of the evidence.

In these respects, the Act violates the constitutional guarantees of indictment by grand jury, judicial trial and trial by jury. Under *Ex Parte Young*, petitioners may not be required to incur the enormous criminal penalties of the Act as the price of securing an adjudication of this constitutional objection, and are entitled to have it determined in this proceeding.

ARGUMENT

I.

The Act and the registration orders violate petitioners' privilege against self-incrimination.

A. Petitioners' claims of the privilege require adjudication in this proceeding.

The court below refused to decide petitioners' contention that the registration orders compel self-incrimination, holding that adjudication of petitioners' claims of privilege must await their prosecution for violating the registration orders (R. 66-69). The holding is erroneous.

Each petitioner has twice asserted his constitutional privilege against being compelled, by a Board order, to register pursuant to section 8 of the Act. He first claimed the privilege in his sworn answer to the Attorney General's petition (R. 5, 33). The Attorney General rejected the claim by continuing to prosecute the petition, and the Board rejected it by conducting the proceeding and issuing the registration orders. Petitioners' claims of the privilege were reiterated in their petitions for review in the court below (R. 28, 60), and were again rejected by the Board and its Attorney, the Attorney General, not as inadequate or premature, but as lacking in constitutional merit. See Brief for Respondent in the court below, pp. 13-20.

In the event that the orders of the Board become final, petitioners will immediately be subject to cumulative penalties of imprisonment for 5 years and fines of \$10,000 for *each day* that they fail to register (sec. 15(a)). If the validity of their claims of privilege is not adjudicated in this proceeding, the threat of these sentences will subject petitioners to the strongest sort of compulsion to register. Yet the Fifth Amendment not only protects persons from punishment for refusing to incriminate themselves but pro-

hibits *compelling* self-incrimination. Accordingly, if petitioners are correct in believing that self-registration under the Act entails self-incrimination, this proceeding affords them the last opportunity to vindicate their constitutional claim to protection against compulsion.

The government conceded in the court below "that the privilege issue is not premature in this proceeding" (Brief for Respondent, p. 15, n. 9), and the opinion below characterized petitioners' contention as "not without force" (R. 66). The court nevertheless held, without mentioning the government's concession, that the issue was premature. This was said to be required by this Court's decision in the *Communist Party* case (R. 66-69).

In that case, a bare majority of the Court (at 106-107) held it premature, on review of the registration order against the Party, to decide whether the registration requirement violated the privilege of the Party officers who were obliged to execute the registration documents. The dissenting Justices believed (at 175-202) that the issue was not premature and that the Act and the Board's order were invalid because they conflicted with the privilege of the officers.

We believe that the majority in the *Communist Party* case was wrong. In any event, the decision is inapplicable.

The primary grounds for the holding in the *Communist Party* case were that no claim of privilege had as yet been made by the officers or acted upon by the Attorney General. The opinion stated (at 107):

"The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. . . . We cannot know now that the Party's officers will ever claim the privilege . . . Within thirty days after the Board's registration order becomes final, the Party's officers may file signed registration statements in

the form required by Form ISA-1. Or they may file statements claiming the privilege in lieu of furnishing the required information. If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions."

Moreover, the Court believed (at 109-10) that the privilege issue as then presented was clouded by unresolved questions as to whether the officers would, or could, assert their privilege "in some form in which it could be recognized" (and see pp. 195-98, dissenting opinion of Justice Brennan). Additionally, the Court apparently was of the opinion that the Party's demand for adjudication of the privilege issue was weakened by considerations of standing arising from the fact that the officers for whose benefit the privilege was invoked were not themselves parties to the proceeding (see pp. 184-85, 193-94, dissenting opinions of Justices Douglas and Brennan).

None of the factors which led the Court to decline adjudication of the privilege of the Party's officers is present here. Petitioners have personally claimed their privilege and their claims have been rejected by the Attorney General and the Board (*supra*, p. 15). No contention has been or could be made that these claims were not in a form which could have been recognized and granted.

Here, therefore, the assertion of the privilege and the refusal to allow it are not matters of conjecture. They are acts which have already taken place and which, therefore, can be adjudged without resort to supposition. Here also, in contrast to the *Communist Party* case, the persons who invoked the privilege are themselves parties to the litigation so that no question of standing can arise.

The court below was plainly wrong in stating (R. 68) that "these circumstances were, of course, all present in

the record before the Supreme Court in the *Communist Party* review proceeding." On the contrary, it was the absence of these circumstances that controlled the Court's decision on prematurity.

The court below envisaged the possibility that, after affirmance of the registration orders, the Attorney General might change his mind as to the validity of petitioners' claims of privilege and honor them (R. 68-69). The court itself recognized that this eventuality was highly improbable (R. 68) as it obviously is in the light of the continuing prosecution of the Communist Party for failure to register (*supra*, p. 5, n. 4)* and the government's insistence, in the court below and here, that petitioners' claims of privilege are without merit (Brief for the Respondent in the court below, pp. 13-20; Brief for the Respondent in Opposition with Regard to Petitioner Proctor, pp. 6-7). If the remote possibility of a change of heart by the Attorney General were a sound reason for judicial abstention, the threat of a government official to enforce an allegedly unconstitutional statute would never give a court jurisdiction of a suit to enjoin him. Moreover, the existence of such a bare possibility in the present case is outweighed by the fact that refusal to adjudicate petitioners' claims in this proceeding will require them to risk life sentences if they are to secure a determination of their constitutional rights.

The government argues (Brief for Respondent in Opposition with Regard to Petitioner Proctor, p. 4) that the privilege issue is premature because, if the registration orders are affirmed, petitioners "may . . . choose to reg-

* In addition to the indictments against the Party, two of its alleged officers have been indicted for failing to register it in violation of section 7(h) of the Act. *United States v. Hall*, D. C. D. C., Criminal No. 228-62, and *United States v. Davis*, D. C. D. C., Criminal No. 229-62. The latter indictment was dismissed upon the death of the defendant. Trial of the Hall indictment is awaiting disposition of the case against the Party.

ister." The argument is specious. Registration after affirmation of the orders can no longer be a free choice since petitioners will be under the compulsion of threatened intolerable punishment.¹⁰ As the history of the constitutional privilege and the literal meaning of its text establish, it was precisely this kind of compulsion that the Fifth Amendment was designed to prohibit. Hence, if petitioners' claims are valid, the effect of withholding adjudication is simply to force them to surrender the protection that the Amendment accords.

Postponing adjudication of petitioners' claims of privilege until their prosecution for failure to register also violates the principle that where disobedience of an administrative order is punishable by severe cumulative criminal penalties, due process requires the availability of a civil remedy to test the constitutionality of the order. *Ex Parte Young*, 209 U. S. 123; *Oklahoma Operating Co. v. Love*, 252 U. S. 331. Cf. *Reisman v. Caplin*, 375 U. S. 440, 446-49.¹¹ Accordingly, in these circumstances the Court has accorded a remedy, when no other was available, by assuming jurisdiction of a proceeding to enjoin enforcement of the statute. Here it is unnecessary to go so far since this statutory review proceeding serves the same purpose.

The court below was therefore mistaken in stating (R. 69) that criminal prosecutions of petitioners for violating the registration orders "will provide an adequate forum for litigation of [the privilege] issue." On the contrary,

¹⁰ Nor does the Act permit a person to escape compulsion to register by resigning from the Party. For once a registration order becomes final, it must be complied with even though the person against whom it was issued has ceased to be a member. See *infra*, p. 35.

¹¹ As stated in *Ex Parte Young*, at 147, "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

it is only the present proceeding that provides the forum to which *Ex Parte Young* entitles petitioners.

Finally, further delay in adjudicating the privilege issue is unreasonable and unfair. It should be recalled that the Communist Party has endeavored for fourteen years to secure an adjudication of its contention that the Act is at war with the constitutional privilege because, on the one hand, it subjects the Party and its members to severe criminal penalties and crippling civil disabilities as participants in a foreign-controlled conspiracy¹² and, on the other, it treats the Party like a public utility by requiring disclosure of detailed information about its affairs, including the identity of its members.¹³ This fourteen year effort has been uniformly rebuffed, first as premature¹⁴ and then on the ground that the government should be given another try at circumventing the constitutional vice inherent in the Act.¹⁵

This delay is the more unwarranted because the Fifth Amendment privilege to be silent, as invoked by the Communist Party and the petitioners, is intimately related to First Amendment freedoms (see *infra*, pp. 37-41).¹⁶ The

¹² E.g., secs. 4(a), 5, 6 and 10, and 8 U. S. C. secs. 1182, 1251, 1424, 1451 (Immigration and Nationality Act).

¹³ Secs. 7 and 8.

¹⁴ *Communist Party v. McGrath*, 96 F. Supp. 47, 340 U. S. 950 (1951); *Communist Party v. S. A. C. B.*, 351 U. S. 115 (1956); the *Communist Party* case, *supra* (1961). Cf. *American Committee for Protection of Foreign Born v. S. A. C. B.*, 380 U. S. 503, and *Veterans of the Abraham Lincoln Brigade v. S. A. C. B.*, 380 U. S. 513.

¹⁵ *Communist Party v. United States*, *supra*, n. 4.

¹⁶ "In these areas [of heresy and political crimes] the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone." Griswold, *The Fifth Amendment Today* (1955), p. 9.

result of postponing consideration of the privilege issue has been to leave in force a statute which President Truman aptly described as one which would "put the Government of the United States in the thought-control business," and "represent a clear and present danger to our institutions." Veto Message, H. R. Doc. No. 708, 81st Cong., 2d Sess., pp. 2, 5.¹⁷ Yet, the Court only recently held that not even delicate questions of federal-state relationships would deter it from assuming jurisdiction to enjoin enforcement of a state statute when necessary to avoid "making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski v. Pfister*, 380 U. S. 479.

Fairness to petitioners and others who are and will be in their situation (*supra*, p. 7, n. 7), as well as a decent regard for the Constitution, demand that the privilege issue be faced up to and decided in this proceeding.

B. The Act and the orders compel self-incrimination.

The Board's orders require each petitioner to "register under and pursuant to section 8(a) and (c)" of the Act "as a member of the Communist Party of the United States of America, a Communist-action organization" as defined in the Act (R. 26, 58). Section 8 expressly requires a member of an organization found to be a Communist-action organization to register himself as "a member of such organization." In accordance with section 8, the registration form prescribed by the Attorney General (Form IS-52a) requires the registrant to declare himself to be a member of the Communist Party, as does the registration statement (Form IS-52).

Accordingly, the Act, the Board's orders and the forms and regulations of the Attorney General compel petitioners

¹⁷ And see the dissenting opinion of Justice Black in *American Committee for Protection of Foreign Born v. S. A. C. B.*, *supra*, at 511.

to acknowledge that they are members of the Communist Party. Admissions of Party membership are incriminating, and may not be compelled. *Blau v. United States*, 340 U. S. 159; *Quinn v. United States*, 349 U. S. 155; *Scales v. United States*, 367 U. S. 203.

The holding in *Blau* was based on the Smith Act. Subsequently, the Act made it a crime to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control (sec. 4(a)). Inasmuch as the Board has found that the Communist Party operates to advance the precise objective which section 4(a) makes it unlawful to promote (*Communist Party* case, at 55), an admission of membership in the organization is highly incriminating under that section. Moreover, Communist Party membership is an element of the offenses of applying for or holding employment forbidden by section 5 of the Act, or of applying for or using a grant or loan in violation of the National Defense Education Act (20 U. S. C. 581(f)(4)). Such membership may also be an ingredient of the offense of using the mails, radio or television in violation of section 10 of the Act. An admission of membership in the Communist Party is likewise incriminating under various state laws. E.g., Texas Rev. Civil Stats., Art. 6889-3A, secs. 5 and 6. See *Stanford v. Texas*, 379 U. S. 476.

An admission of membership in the Communist Party may not be compelled for an additional reason. The Act subjects such members to crippling disabilities. They are ineligible for non-elective federal employment, for employment by privately owned "defense facilities," and for office or employment in labor unions (sec. 5).¹⁸ The citizenship of naturalized citizens may be revoked if they be-

¹⁸ Section 6, making them ineligible for passports was held unconstitutional in *Aptheker v. Secretary of State*, 378 U. S. 500.

came members within five years after naturalization. Alien members may not be naturalized but must be deported if within the country or excluded if outside of it.¹⁹ Additional disabilities are imposed on members of the Communist Party by state legislation. See, e.g., *Adler v. Board of Education*, 342 U. S. 485.

Admissions that expose a person to imposition of these disabilities may not be compelled in the face of a claim of constitutional privilege. *Boyd v. United States*, 116 U. S. 616, held (at 638) that, "A witness, as well as a party, is protected by law from being compelled to give evidence that tends to incriminate him, or to subject his property to forfeiture" (emphasis supplied). See also at 630, 631. To the same effect, *Lees v. United States*, 150 U. S. 476; *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U. S. 693 (concurring opinion). The rights which are forfeited by the Act are at least as valuable and important as property rights and should be similarly protected. *Ullmann v. United States*, 350 U. S. 422, 440-443 (dissenting opinion).

The registration documents call for incriminating admissions in addition to the admission of Communist Party membership.

Forms IS-52a and IS-52 both require an admission by the registrant that the Communist Party is (not merely was found to be) a Communist-action organization. In view of the Act's definitions (secs. 2 and 3(3)), and the Board's findings, this admission by a registrant is plainly incriminating under section 4(a) and the Smith Act.

Furthermore, the registration statement (Form IS-52) calls for all names used by the registrant in the previous ten years and for the Party offices he held in the preceding

¹⁹ Originally contained in secs. 22 and 25 of the Act, these sanctions are now found in secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G), and 340(c) of the Immigration and Nationality Act, 8 U. S. C. 1182, 1251, 1424, 1451.

year. This information is obviously incriminating and is demanded for no other purpose. Form IS-52 also calls for the date and place of the registrant's birth. This is identifying information, useful in efforts to link the registrant with criminal conduct. Moreover, if the registrant is an alien or naturalized person, it may be used to support efforts to deport or denaturalize him.

It is beyond dispute, therefore, that the Act and the orders of the Board requiring petitioners to register and file registration statements compel incriminating admissions. *Cf. Russell v. United States*, 306 F. 2d 402; *People v. McCormick*, 102 Calif App. 2d Supp. 954, 228 P. 2d 349.

C. Section 4(f) does not supplant the privilege.

Congress recognized that the registration requirements of the Act compel self-incrimination and sought to obviate the constitutional defect by the inclusion of section 4(f).²⁰ The section does not accomplish this purpose.

The first sentence of section 4(f) states that membership in a Communist organization²¹ shall not "constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." This provision does not take the place of the privilege because it does not confer immunity for offenses—like the membership clause of the Smith Act—in which membership in the Communist Party is but one of several ingredients or a "link in the chain of evidence." *Blau v. United States*, *supra*, at 161; *Scales v. United States*, 367 U. S. 203.

The second sentence of section 4(f) states:

"The fact of registration of any person under section 7 or section 8 of this title as an officer or mem-

²⁰ The legislative history of the section is reviewed in *Scales v. United States*, 367 U. S. 203, 211-19; 279-86 (dissenting opinion).

²¹ Section 3(5) defines Communist organizations to include Communist-action, Communist-front and Communist-infiltrated organizations.

ber of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

This provision does not supplant the privilege.

1. The provision merely protects against the use of a registrant's admission of membership as evidence against him in a criminal prosecution. It does not give him immunity from prosecution on account of membership. Since the protection given is not co-extensive with the privilege, it does not displace the privilege. *Counselman v. Hitchcock*, 142 U. S. 547.

Counselman reasoned (at 564, 586) that a statute which simply excluded the evidentiary use of a compelled incriminating admission could not supplant the privilege because it did not protect against use of the admission as a lead to other incriminating evidence. But the Court rested its decision invalidating such a statute on a broader ground. It held unequivocally (at 585-586):

"We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It was this holding that led Congress to replace the statute which the Court invalidated with the full immunity statute which was sustained in *Brown v. Walker*, 161 U. S. 591. See the latter at 594 and *Hale v. Henkel*, 201 U. S. 43, 67. And it has been held ever since that incriminating admissions cannot be compelled by any federal authority except in exchange for absolute immunity from prosecution for offenses to which the admissions relate. *E.g.*, *Smith v. United States*, 337 U. S. 137, 147, 150; *United States v. Bryan*, 339 U. S. 323, 336; *Adams v. Maryland*, 347 U. S.

179, 182; *United States v. Monia*, 317 U. S. 424, 428; *Hale v. Henkel*, *supra*, at 67; *Brown v. Walker*, *supra*, at 594-95. And see VIII Wigmore, Evidence (McNaughton Rev.), sec. 2283.

The government suggested that section 4(f) nevertheless supplants the privilege under the circumstances of the present case. This, it is said, is because the Board proceedings "demonstrated that the Attorney General already had reason to believe that petitioner was a Party member," and hence "the mere fact of registration could not provide the Attorney General with any new leads." Brief for Respondent in Opposition with Regard to Petitioner Proctor, p. 7. Thus the argument is that a statute of the *Counselman* type is effective in ousting the privilege wherever the government is already in possession of the incriminating information the disclosure of which it seeks to compel.

This bizarre proposition seizes on the remarks in *Counselman* concerning the use of incriminating admissions as leads to other evidence of crime, but ignores the principle which the decision established. The result is a perversion of the function of immunity statutes.

The bare majority of the Court in *Brown v. Walker*, *supra*, which held that a statute conferring absolute immunity displaces the privilege was persuaded to do so (at 595, 610) by the consideration that a contrary result would permit criminals to conceal their misdoings and frustrate the enforcement of regulatory statutes.²² But the government's proposal would be of no possible aid to law enforcement. For the proposal permits an incriminating admission to be compelled only on the condition that it is useless—i.e., if it cannot be introduced in evidence and provides the prosecutor with no leads he does not already have.²³

²² For a criticism of this decision, see *Ullmann v. United States*, 350 U. S. 422, 443-455 (dissenting opinion).

²³ The due process and First Amendment objections to such coercion are discussed *infra*, pp. 33-41.

The argument that an incriminating admission may be extorted if it is valueless is reminiscent of the discredited proposition that the admission in evidence of a coerced confession does not vitiate a conviction where other proof of guilt made use of the confession superfluous. *Jackson v. Denno*, 373 U. S. 368, 376; *Watts v. Indiana*, 338 U. S. 49, 50 n. 2. As the Court stated of the means used to secure a confession in *Haynes v. Washington*, 373 U. S. 503, 519:

"The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public."²⁴

Furthermore, the government's argument proves too much. For it would cover all cases in which the privilege is invoked, including those to which no statute of the *Counselman* type is applicable. This is so because such statutes are not necessary to prohibit the evidentiary use of an incriminating admission which a person has been compelled to make after claiming his privilege. "The Fifth Amendment takes care of that without a statute." *Adams v. Maryland*, 347 U. S. 179, 181.²⁵ Accordingly, if the government's proposal were accepted, claims of privilege would never be honored where the government could show

²⁴ We later show that the confession of membership which the Act compels has no relation to the protection of any public interest. See *infra*, pp. 33-34.

²⁵ Accordingly, *Adams v. Maryland* holds that the only function of a statute of the *Counselman* type is to prohibit the evidentiary use against a person of an incriminating admission made by him *without* first claiming his privilege against being required to answer. Since the accused in *Counselman* had claimed his privilege (see p. 549), the statute, as applied to him, added nothing to the protection of the Fifth Amendment itself. The opinion, however, does not advert to this point.

that it was already in possession of the incriminating information that answers to its questions would disclose.

But this broad exception to the protection which the privilege affords is unwarranted by the text of the Fifth Amendment²⁶ and is contrary to the entire history of its application by the Court. For it has never been considered relevant to the validity of a claim of privilege that the government already had the information it sought to elicit from the witness. And it has made no difference in this respect that the privilege was claimed in a proceeding to which a *Counselman* type of statute was applicable.

In *Counselman* itself, the government must at least have suspected the witness of receiving the unlawful rebates which were the subject of the inquiry, and may well have had the proof. Similarly, in upholding claims of the privilege by witnesses before Congressional Committees who refused to answer as to their membership in the Communist Party, the Court has never suggested that former 18 U. S. C. 3486²⁷ supplanted the privilege where it appeared that the committee had evidence, at the time it questioned the witnesses, of their membership in the Party. E.g., *Emspak v. United States*, 349 U. S. 190; *Quinn v. United States*, 349 U. S. 155.

In *Emspak*, for example, the committee not only had evidence that the witness was a Party member but had

²⁶ Cf. *Counselman*, at 564-65: "The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' . . . It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him."

²⁷ Before its amendment in 1954, this section precluded the use of the testimony of a witness before a Congressional Committee as evidence against him in a criminal prosecution. See *United States v. Bryan*, *supra*, at 335 and *Adams v. Maryland*, *supra*.

published a finding to that effect. Transcript of the Record, No. 67, October Term, 1953, pp. 49-50, 242, 245, 297. Moreover, the opinion points out (at 200) that, prior to his appearance before the Committee, Emspak had been identified as a Communist in testimony given in a Smith Act prosecution of the Party leaders. The Court adverts to this fact, however, not as invalidating or weakening Emspak's claim of privilege, but to emphasize the propriety of its assertion.

Finally, the government's proposal would turn every claim of privilege into a guessing game. For the propriety of the claim would no longer depend on facts about himself which the witness knows but on how much of what he knows about himself is also known to the government.

The government argues that *Murphy v. Waterfront Commission*, 378 U. S. 52, has devitalized the *Counselman* rule that Congress can supplant the privilege by nothing less than an absolute grant of immunity from prosecution. Brief for Respondent in Opposition with Regard to Petitioner Proctor, p. 6. *Murphy* extended the scope of the privilege by holding (at 77) that a state may not constitutionally compel a witness to give testimony which might incriminate him under federal law. Since the states cannot confer immunity from prosecution for federal crimes, *Murphy* was required (at 79) to "accommodate" the newly established constitutional principle to the interest of the states in preserving their immunity laws as instruments for law enforcement. The need for accommodation led to the holding (*ibid*) that incriminating testimony may be compelled under a state immunity statute, but that neither the testimony nor its fruit may be used in a federal prosecution of the witness. The Court recognized (*ibid*) that this resolution of the problem created by the peculiarities of our federal system did not give a witness the full equivalent of the privilege, but left him only in "substantially the same position" as though his claim of privilege had been upheld in the absence of an immunity statute.

Nothing in the majority opinion remotely suggests a retreat from *Counselman* where no accommodation to state interests is required. Since Congress can and does grant absolute immunity from state prosecution, the problem to which *Murphy* was addressed does not arise in the case of federal immunity statutes. *Brown v. Walker, supra*. In this area, therefore, there is no occasion for, and no intimation in *Murphy* of, a relaxation of the rule in *Counselman* to permit incriminating testimony to be compelled on terms that give a witness only "substantially" the protection that a claim of privilege affords.²⁸

Moreover, section 4(f) would not bar a claim of privilege even if the *Murphy* doctrine were extended to federal immunity statutes. For 4(f) does not prohibit use of the fruit of incriminating admissions. *Scales v. United States, supra*, at 210-219. Finally, the result in *Murphy* turned on weighty considerations of law enforcement while, as we have seen, the government's proposal would authorize the extortion of confessions only when they serve no such purposes.

2. The argument that section 4(f) supplants the privilege is predicated on the assumption that the section prohibits the evidentiary use of the fact of a person's registration as a Communist Party member in *any* criminal proceeding against him. The foregoing discussion has demonstrated that, granted the assumption, the argument is nevertheless fallacious. In fact, the assumption itself is erroneous.

Section 4(f) provides that the fact of a person's registration as a Party member shall not be received in evidence against him "in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section

²⁸ Similarly, there is no intimation in *Murphy* that a state can supplant the Fifth Amendment privilege by a statute that grants anything less than absolute immunity from state prosecution.

or for any alleged violation of any other criminal statute." By its terms, this provision is not applicable to prosecutions under sections of the Act other than 4(a) and 4(c). Hence it permits the use of an accused's registration to prove his membership in the Communist Party in prosecutions under section 15(c) for violating the employment and labeling provisions of sections 5 and 10.²⁹

The legislative history of the Act confirms the interpretation of section 4(f) which a literal reading of its text requires. This history shows that the version of the Act which passed the House expressly prohibited use of the fact of the registration of the accused as a Party member in prosecutions under sections 5 and 6 of the Act. These prohibitions, however, were eliminated by the Senate. Accordingly, the failure of Congress to extend the exclusionary rule of section 4(f) to prosecutions under sections of the Act other than 4(a) and 4(c) was deliberate. The pertinent excerpts from the legislative history are set forth in Appendix B, *infra*.

The government urges that section 4(f) should not be given the limited application which a literal interpretation of its text and the legislative history demand. It argues that, "Since the purpose of Section 4(f) was to meet criticism that the Act might be unconstitutional under the Fifth Amendment, it is clear that Section 4(f) also applies to prosecutions under other provisions of the Act itself, such as those involving employment and labeling of publications." Brief for the Respondent in Opposition with regard to Petitioner Proctor, pp. 6-7. *Scales v. United States*, *supra*, rejected a similar argument, stating (at 219):

"To conclude that Congress' desire to protect the registration provisions of the Internal Security Act against pleas of self-incrimination should prevail

²⁹ Similar use of the registration of the accused was permitted by the Act in prosecutions for violating the passport ban of section 6, held unconstitutional in *Aptheker v. United States*, *supra*.

over its advertent failure to secure that result . . . would require a disregard by this Court of the evident Congressional purpose."

The ban of section 4(f) on the use of the fact of registration to prove the Party membership of a registrant is also deficient because it is confined to criminal proceedings and is inapplicable to forfeitures. Accordingly, the registration of a person as a Party member may be used against him in proceedings to denaturalize, deport or exclude him or to enforce disqualifications imposed by state legislation. And such registration (which is a matter of public record under section 9 of the Act) may, of course, be used by governmental or private employers as a basis for denying the registrant employment forbidden to Communists by section 5 of the Act or by state or local law.

3. Section 4(f) not only fails to bar the evidentiary use in *every* prosecution of a registrant of the fact of his registration as a Party member; nothing in the section bars the evidentiary use in *any* such prosecution of the other incriminating admissions called for by the registration documents.

Thus both the registration form and the registration statement (Forms IS-52a and IS-52) could be introduced in prosecutions of petitioners under section 4(a) of the Act or the Smith Act as admissions by them that the Communist Party is a Communist-action organization as defined in the Act. Likewise, the registration statements could be introduced in any criminal prosecution of petitioners to prove such possibly incriminating facts as aliases, Party offices and dates and places of birth. Finally, nothing in 4(f) prevents the government from using any of this information as leads to other evidence that might incriminate petitioners.

11.

The Act and the registration orders deny substantive due process because they serve no governmental purpose and are irrational. Moreover, they inflict punishment and constitute a bill of attainder.

The *Communist Party* case, at 88-105, sustained the constitutionality of section 7(d) of the Act, requiring a Communist-action organization to furnish the names of its members to the Attorney General. The Court held that the compulsory disclosure of the identity of the members of such an organization was a reasonable security measure.

We believe that the Court was in error for the reasons stated in the dissenting opinion of Justice Black. However that may be, the Court's justification of section 7(d) has no application to the requirement of section 8 for the self-registration of persons who are found by the Board to be members of a Communist-action organization.

The decision in the *Communist Party* case, if allowed to stand, would be relevant to a statute authorizing the Board to determine and disclose the identity of the members of a Communist-action organization which failed to file the membership list required by section 7(d). But the Act goes further. It provides that the Board shall order persons whom it finds to be members to register themselves as such, and imposes onerous criminal penalties for disobedience (secs. 13(g)(2) and 15(a)(2)). The *Communist Party* case did not consider, much less dispose of, this feature of the Act.³⁰

Registration as a member of the Communist Party by a person whom the Board has found, pursuant to section 13(g)(2), to be a member serves no disclosure function. The finding itself performs this function. Self-identifica-

³⁰ Consideration of the member registration requirements was held (at 73 n. 22 and 79-81) to be premature.

tion of a member by registration is therefore superfluous. Hence, unlike the provision of the Act sustained in the *Communist Party* case, the member registration requirement cannot be justified as a disclosure measure. Nor does it serve any other governmental interest. Instead, it imposes cumulative penalties amounting to life imprisonment on persons who refuse obedience to a demand that the government has no business in making.

A law which punishes non-compliance with exactions having no governmental purpose is an arbitrary exertion of power prohibited by due process. "No one would deny that the infringement of constitutional rights of individuals would violate the guarantees of due process where no state interest underlies the state action." *Sweezy v. New Hampshire*, 354 U. S. 234, 254. And see *Perez v. Brownell*, 356 U. S. 44, 58. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock*, 361 U. S. 516, 524. Here, no subordinating interest whatsoever can be shown.

No governmental purpose is added to the member registration procedures of the Act by section 8(c) which provides that registration "shall be accompanied by a registration statement" containing "such information as the Attorney General shall by regulation proscribe." Since the registration statement is to "accompany" registration, it need be filed only by those who register as members. Accordingly, the invalidity of the registration requirement eliminates the obligation to file a registration statement. In any event, section 8(c) could serve no legitimate governmental interest since Congress left the nature and purposes of the informational demand wholly undefined. *Sweezy v. New Hampshire*, 354 U. S. 234, 254. For the same reason, the section is also invalid as an unfettered delegation of legislative power (*Panama Refining Co. v. Ryan*, 293 U. S. 388) and as an authorization

of an exploratory search without judicial supervision in violation of the Fourth Amendment. *Boyd v. United States*, 116 U. S. 616 630; *Jones v. S.E.C.*, 298 U. S. 1; *Lopez v. United States*, 373 U. S. 427, 460 (dissenting opinion); *United States v. Rabinowitz*, 339 U. S. 56, 62. Finally, the only conceivable purpose of Form IS-52 is to compel a registrant to supply the Attorney General with evidence for use against him in a criminal prosecution. See *supra*, p. 32.

The member registration requirement is irrational as well as purposeless. It compels persons to register as members of a Communist-action organization who are not members at the time of registration.

This is so because section 15(a) predicates criminal liability on the failure of a person to register as a member in obedience to a final registration order, even though he is no longer a member at the time the order becomes final. A person who was a member at the time of the Board proceedings, but who has resigned or (as the government says occurred in the case of petitioner Albertson)³¹ has been expelled by the time the order that he register becomes final, must nevertheless obey the order or incur the penalties of section 15(a).³² Such a person can secure relief from the registration requirement only by first registering as a member, although he is not one, and then making application under section 13(b) for the cancellation of his registration. Thus, far from aiding disclosure of the truth, the Act compels persons to make false statements.

³¹ Memorandum for Respondent Suggesting that the Cause Is Moot with Regard to Petitioner Albertson.

³² A considerable time may elapse between the evidentiary hearing and the date that the Board's order becomes final. In the present case, the hearings were held in September 1962 and November 1962, respectively (R. 8, 37). The latest activity relied on by the Board as evidence of Communist Party membership was in March 1962 for Proctor (R. 44-49) and in July 1962 for Albertson (R. 16-24).

The Act not only violates due process but is a bill of attainder. Since persons cannot avoid registration as members of a Communist-action organization by terminating their membership, the registration requirement is not a regulation of future membership but an inescapable punishment for past membership. Congress delegated an administrative agency—the Board—to impose this punishment. Since it is imposed without a judicial trial, the Act is a bill of attainder. *United States v. Brown*, — U. S. —, June 8, 1965.

The Court below did not consider whether petitioners' registration as members of the Communist Party would serve any purpose not accomplished by the findings of the Board that they were members. It avoided the inquiry, stating (R. 71) that, "we cannot now entertain constitutional objection on grounds that there is no independent governmental purpose" for the member registration requirement. The reason given for this conclusion was (*ibid*) that, "in the absence of more comprehensive interpretation of the Act, particularly regarding the sanctions",²⁸ than this Court gave in the *Communist Party* case, "we do not know whether an additional function is performed." This is not a comprehensible, let alone an acceptable, ground for the court's abstention. At any rate, the question which was avoided below is inescapable here. The answer requires invalidation of the member-registration requirement as arbitrary and irrational.

²⁸ "Sanctions" refers to the provisions of the Act imposing civil disabilities, such as ineligibility for certain employment, upon members of Communist-action organizations.

III.

The Act and the registration orders violate the First Amendment by abridging freedom of belief, conscience and association without a governmental purpose.

The defect of the Act arising from its exaction of conduct which serves no governmental purpose is compounded by the fact that the conduct exacted is speech. The speech that is compelled consists of a declaration which is contrary to the conscience and belief of the declarant, invades his privacy and is self-defamatory. Moreover, the registration requirement restrains freedom of association for lawful political purposes. For these reasons, the Act and the Board's orders violate the First Amendment as well as due process.

A. The First Amendment not only "guards the individual's right to speak his own mind", but limits the power of public authorities "to compel him to utter what is not in his mind." *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 634. At a minimum, the Amendment demands some valid governmental reason for ordering a person to make a prescribed statement or lose his liberty. As we have seen (*supra*, pp. 33-34) the member registration requirement serves no governmental purpose. Hence, the Act would violate the First Amendment even if the required declarations were innocuous.

The declaration of membership in the Communist Party which a registration order exacts is far from innocuous. It is a coerced avowal of political belief and affiliation, historically a tool of oppression, and a sign of acquiescence in the right of government to engage in this invasion of privacy. Also, because the compulsion is grounded on a governmental finding that the Communist Party is a criminal conspiracy, registration signifies acceptance of the truth of the finding and is self-dafamatory. Indeed, the registra-

tion documents (Forms IS-52a and IS-52) require the registrant to state in so many words that the Communist Party is a Communist-action organization, thereby making explicit the admission that the act of registration implies.

It is immaterial under the Act that a person found by the Board to be a Party member rejects the findings of the Act and the Board concerning the nature of Communism and the Communist Party;³⁴ that it is against his conscience to lend himself to a political inquisition; that he disagrees with the finding that he is a member³⁵ or that his membership has terminated before registration. He must register nevertheless, or lose his liberty, possibly for life, for refusing to forswear himself by certifying as true propositions that he believes to be false.

"Of course we agree that one may not be imprisoned or executed because he holds particular beliefs." *American Communications Association v. Douds*, 339 U. S. 382, 400. No more may government "compel affirmation of a repugnant belief." *Sherbert v. Verner*, 374 U. S. 398, 402; *Torasco v. Watkins*, 367 U. S. 488, 495. Yet that is what the Act and the orders of the Board require of petitioners.

West Virginia Board of Education v. Barnette, *supra*, invalidated a compulsory salute to the flag which (at 633), "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." It did so despite considerations of the public interest which some of the Justices found persuasive. Here, no conceivable public interest is served by requiring petitioners to

³⁴ The answers of petitioners in the administrative proceedings denied the allegations of the Attorney General's petitions that the Communist Party is a Communist-action organization (R. 5, 33).

³⁵ In view of the extravagant indicia of Communist Party membership contained in section 5 of the Communist Control Act (50 U. S. C. 844) and applied in *Killian v. United States*, 368 U. S. 231, many persons who do not believe themselves to be members can readily be found to be such.

communicate by word and sign their acceptance of the political ideas that the Act bespeaks.

The First Amendment forbids governmental compulsion on an individual to affirm the correctness of an official finding that he was a wrongdoer. For this reason, the National Labor Relations Board has been denied the authority to order employers to post notices that they will cease and desist from unfair labor practices of which they have been found guilty. *Art Metals Construction Co. v. N.L.R.B.*, 110 F. 2d 148; *Hartsell Mills Co. v. N.L.R.B.*, 111 F. 2d 291; *Kansas City P. & L. Co. v. N.L.R.B.*, 111 F. 2d 340; *Swift & Co. v. N.L.R.B.*, 106 F. 2d 87; *N.L.R.B. v. Louisville Refining Co.*, 102 F. 2d 678.

As Judge Learned Hand stated in the *Art Metals* case, *supra* (at 151):

"But we think that to compel [the employer] to say that he will 'cease and desist,' necessarily imports that in the past he has been doing the things forbidden; indeed we find it hard to see how the contrary can rationally be argued. Forcibly to compel anyone to declare that the utterances of an official, whoever he may be, are true, when he protests that he does not believe them, has implications which we would hesitate to believe Congress could ever have intended . . . too long a history and too dearly bought privileges are behind such refusals."

Similarly, Judge Parker stated in the *Hartsell Mills* case *supra* (at 293):

"We cannot imagine a court sending a convicted employer to jail for not publishing a confession that he has been guilty of violating the law, for not even a convicted felon can be required to confess his guilt."

The member registration requirements are invalid under the principle of these decisions.

B. The First Amendment prohibits restraints on membership in the Communist Party which "cut deeper into

the freedom of association than is necessary to deal with the 'substantive evils that Congress has a right to prevent.' " *Scales v. United States*, 367 U. S. 203, 229. And see *Aptheker v. Secretary of State*, 378 U. S. 500, 507-508. To compel members of the Communist Party to register as such with the Attorney General and file registration statements that are available for public inspection (sec. 9) obviously restrains their freedom of association in the organization. Cf. *Thomas v. Collins*, 323 U. S. 516; *Lamont v. Postmaster General*, — U. S. —, May 24, 1965.

The restraint is imposed without regard to the nature of the member's association. It is irrelevant under the Act that the member is innocent of wrongdoing; that he is not active in the organization, or that his activity is confined to protected political advocacy; that he does not know or believe that the organization is engaged in illicit conduct or has the characteristics ascribed to it by the Act and the Board, and that he intends through his membership only to promote social change by peaceful means. The member registration requirement, therefore, lacks the elements of knowledge, intent and activity which permitted the Court to sustain the restraint on Communist Party membership imposed by the membership clause of the Smith Act. *Scales v. United States*, *supra*, at 229-230. And it was the absence of these elements that invalidated the passport ban of section 6 of the Act. *Aptheker v. Secretary of State*, *supra*, at 509-514.

In their absence, the member registration requirement is too sweeping. It abridges the freedom of association of "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies." *Scales*, at 229. The membership of such a person bears no relation to any substantive evil within the competence of Congress, and may not be restrained. "Broad prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone in an area so closely

touching our most precious freedoms." *N.A.A.C.P. v. Button*, 371 U. S. 415, 439.

Moreover, the decisions of the Court "have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedoms.'" *Lamont v. Postmaster General*, *supra* (concurring opinion), quoting from *N.A.A.C.P. v. Button*, *supra*, at 438. Under the Act, as we have seen, any governmental interest in the identity of the members of the Communist Party is secured by the Board's findings of membership. Since self-identification by the member is therefore superfluous, the government has no interest in requiring it. Hence, the requirement violates the First Amendment.

The court below dismissed petitioners' First Amendment argument as foreclosed by the *Communist Party* case (R. 71-72). There is no substance to this view. The *Communist Party* case applied the balancing test of the reach of the First Amendment. It held (at 88-105) that the interest of the members of a Communist-action organization in the privacy of their affiliation was outweighed by the government's security interest in removing their "mask of anonymity." We believe that the decision should be re-examined and overruled, but it does not govern this case. Here, the "mask of anonymity" has been removed by the findings of the Board. Since there is no other governmental interest that can be put in the balance on the side of the registration requirement, it cannot survive the balancing test, let alone the clear and present danger test.

IV.

The Act and the registration orders violate procedural due process and the prohibition against bills of attainder because they made the Board's 1953 determination that the Communist Party was a Communist-action organization conclusive upon petitioners as to the present character of the Party.

The answers of petitioners in the administrative proceeding denied the allegations of the Attorney General's petitions that the Communist Party is a Communist-action organization (R. 5, 33). The Attorney General offered no evidence in support of this allegation. It was his position and that of the Board that petitioners were bound by the determination which the Board made in 1953 in the proceeding against the Party (R. 13-14).

In 1962-1963, therefore, petitioners were ordered to register under the Act (R. 26, 58) on the basis of a determination, made ten years earlier in a proceeding to which they were not parties, that the Communist Party was a Communist-action organization. Yet the accuracy of this factual determination as to the character of the Party supplies the only constitutional justification that can be advanced for the registration orders against petitioners.

The Board's ruling making its 1953 determination that the Communist Party was a Communist-action organization conclusive against petitioners precluded them in two respects. They were bound by the Board's evidentiary findings in the proceeding against the Party that the Party was controlled by, and operated to advance the objectives of, the Soviet Union (sec. 3(3)). They were also bound by the Board's action in the Party proceeding identifying the Soviet Union as the foreign power, referred to in section 2, which controls a monolithic world Communist movement. In both respects, the ruling violated procedural due process and the prohibition against bills of attainder.

A. The 1953 findings with respect to the Party.

The ruling that petitioners were concluded by the Board's prior determination with respect to the control and activities of the Communist Party is required by section 8 of the Act. For that section predicates the obligation to register on membership in an organization as to which "there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization." The requirement that petitioners register is plainly invalid unless, at least, the Communist Party is a Communist-action organization. The procedure of the Act, therefore, violates the due process principle that persons may not be deprived of liberty without a hearing at which they are accorded an opportunity to contest the factual premises on which the validity of the deprivation depends. "We may assume for present purposes . . . that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." *United States v. Carolene Products Co.*, 304 U. S. 144, 152. *Noto v. United States*, 367 U. S. 290, 299; *Renaud v. Abbott*, 116 U. S. 277, 288. Cf. *Kirby v. United States*, 174 U. S. 47.

Congress apparently recognized that this due process requirement was applicable to the criminal prosecution of members of Communist-action organizations for violating the employment and passport prohibitions of sections 5 and 6 of the Act. For sections 5(a) and 6(a) require the government to prove not only that the organization of which the accused is a member has registered or been ordered to register, but also that it is "a Communist organization as defined in paragraph (5) of section 3."³⁶ Due process

³⁶ Section 3(5) defines "Communist organization" as including Communist-action, Communist-front and Communist-infiltrated organizations.

similarly requires a hearing on the character of the organization in proceedings to compel persons to register as members.⁸⁷

This due process defect is aggravated by the fact that the determination of the Board which concluded petitioners was ten years old. In this changing world, a conclusive presumption that a state of facts, once found to exist, will continue in perpetuity is plainly arbitrary. It is therefore a principle of due process that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, *supra*, at 153; *Christleton Corporation v. Sinclair*, 264 U. S. 543; *Baker v. Carr*, 369 U. S. 186, 214.

The rule of these decisions has peculiar pertinence to factual findings which, like the Board's, involve an evaluation of social and political ideas and phenomena. Moreover, as the Chief Justice observed in his dissent in the *Communist Party* case (at 134, n. 11), the Board's 1953 finding was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940.⁸⁸ And only last term, the Court remanded a proceeding under the Act to the Board because evidence taken in 1955 was held to be too stale to support a Board finding made five years later that the organization proceeded against was a Communist-front organization. *American Committee for Protection of Foreign Born v. S.A.C.B.*, *supra*. See also, *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*, *supra*.

⁸⁷ A person ordered to register as a member receives no hearing on the character of the organization when prosecuted for his failure to do so. For 15(a) makes the registration order conclusive of the obligation of the accused to register. See *infra*, pp. 51-55.

⁸⁸ The majority (at 69) declined to pass on the sufficiency of this evidence.

Accordingly, even if it could be said that, because petitioners were found to be members of the Communist Party, they are bound by the 1953 determination of the Party's nature, due process would still entitle them to a hearing on the *current* character of the organization. This is denied them by the Act.

The authors of the Act recognized the possibility that a finding that an organization is a Communist-action organization might lose its validity. Section 13(b) and (i) permits an organization which has registered as a Communist-action organization to apply for a cancellation of its registration not oftener than once a year, and to secure such relief on showing that it is no longer a Communist-action organization. However, the Act does not allow an unregistered organization to seek a redetermination of its status. Nor can a member secure a redetermination of the organization's status, whether or not he or it is registered.³⁹

The Communist Party has not registered under the Act and is still litigating the contention, held premature in the *Communist Party* case, that it cannot constitutionally be required to do so. See *supra*, p. 5. If it is successful in this litigation, or if it persists in refusing to register despite an adverse decision, members of the organization can never escape the effect of the Board's 1953 determination.

Section 4 of the Communist Control Act, 50 U.S.C. 843, further demonstrates that Congress intended the members of the Communist Party to be concluded in perpetuity by the finding that the Party has the characteristics of a Communist-action organization. The section provides that, "Whoever knowingly and willfully becomes or remains a

³⁹ A person who has registered as a member can apply for a determination that he has ceased to be a member and secure the cancellation of his registration on that ground. See *supra*, p. 35.

member of (1) the Communist Party . . . with knowledge of the purpose or objective of such organization shall be subject to all of the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action organization.' "

The member registration requirements of the Act as here applied not only violate procedural due process but constitute a bill of attainder. *United States v. Brown, supra*. Unlike the statute invalidated in that case, the Act does not itself identify the Communist Party by name but delegates to an administrative agency the function of specifying the organization which satisfies the Act's definition of a Communist-action organization. The difference is immaterial, however. Now that the specification has been made by the Board and affirmed, the situation of a member is as though the Party had been named in the Act. For the requirement that he register attaches, not to his membership in an organization having described characteristics, but to his membership in a specified organization—the Communist Party—whether it fits the statutory description or not.

The majority in the *Communist Party* case recognized that the Act's requirement of registration by an organization found to be a Communist-action organization would violate due process and the prohibition against bills of attainder unless it permitted an escape from the consequences of the finding in the event of changed circumstances. The Court believed that a proceeding under section 13(b) by a registered organization for cancellation of its registration afforded the required escape.⁴⁰ Thus, the opinion stated (at 87):

"In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in

⁴⁰ The only dissenting Justice who reached the issue (Justice Black) believed the Act (at 146-147) to be a bill of attainder and a violation of due process.

which it now engages, comes within the terms of the Act. If the Party should at any time choose to abandon these activities, after it is once registered pursuant to § 7, the Act provides adequate means of relief . . . §§ 13(b), (i) (j), 14(a)."

What the Court overlooked in the quoted passage was that litigation of the constitutional objections to the Act which it dismissed as premature might be prolonged and could eventuate in a decision that the Communist Party may not constitutionally be required to register. Contrary to the Court, a section 13(b) proceeding does not provide "adequate means of relief" to the Party because of changed circumstances, at least so long as the issues are in litigation. Nor, paradoxically, will it ever do so if the outcome favors the Party. We therefore believe that the Court erred in holding that section 13(b) and (i) saves the requirement of registration by organizations from condemnation as a bill of attainder and a denial of procedural due process.

Moreover, because of the piecemeal approach adopted in the *Communist Party* case to the constitutional difficulties which the Act presents, the Court did not consider the situation of a person who has been ordered to register as a member of the Party. Such a person, as we have seen, is given no "means of relief" whatsoever on the grounds that changed circumstances have invalidated the Board's 1953 finding with respect to the Party. Accordingly, the member registration requirements *do* attach "to the past and ineradicable actions of an organization" (the Communist Party), and are *not* "made to turn on continuously contemporaneous fact." *Communist Party* case, at 87. These are the earmarks of a bill of attainder.⁴¹

⁴¹ The constitutional attack on the Act on the grounds urged in this point was made but not reached in *Aptheker v. Secretary of State*, *supra* (Brief for Appellants, pp. 48-52), and *American Committee for Protection of Foreign Born v. S.A.C.B.*, *supra* (Brief for Petitioner, pp. 110-11).

The Court below dismissed petitioners' contention, stating (R. 73):

"In the absence of any showing that circumstances have changed significantly since the Board's determination of the Party's status in 1953, we do not find it necessary to reexamine the issue here."

This begs the question since the constitutional defect of the Act, as written and as applied by the Board (R. 13-14), is that it precludes petitioners from making any such showing.

B. The 1953 finding with respect to the world Communist movement.

The *Communist Party* case (at 112) affirmed the conclusion of the Board, in construing the Act, that the Soviet Union was the foreign power referred to in section 2 which controlled the monolithic world Communist movement described in that section. The Court recognized, however, that changed circumstances would require a change in this construction. It stated (at 113):

"If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which § 2(1) and (4), fairly read in their context, refer—so that substantial domination by the Soviet Union would not bring an organization within the terms of § 3(3)—that, too, will be a matter of statutory construction which no 'findings' in the statute foreclose. The Board or a reviewing court will be able to say that the 'world Communist movement,' as Congress meant the term in 1950 (and whether or not there really existed, in 1950, a movement having all the characteristics described in § 2), no longer exists, or that Country X or Y, not the Soviet Union, now directs it."

It was only because the Court held that the Board and the courts were empowered to reconstrue section 2 in the light of contemporary fact that the Act was held (at 110-114) not to offend due process.

The eventuality foreseen by the Court when the world Communist movement as described in section 2 of the Act "no longer exists" has materialized. Whatever might have been the prevailing view concerning the findings of section 2 when Congress made them in 1950, their description of the world Communist movement is plainly anachronistic today. Statesmen and scholars alike recognize that the picture of Communism as a monolithic world movement, under iron Soviet discipline and control, and dedicated to the overthrow of all free governments by criminal and conspiratorial means, bears no resemblance to contemporary reality.

George F. Kennan has summarized current Western opinion on the subject as follows:

"Much of the discussion in Western countries today of the problem of relations with world Communism centers around the recent disintegration of that extreme concentration of power in Moscow which characterized the Communist bloc in the immediate aftermath of the Second World War, and the emergence in its place of a plurality of independent or partially independent centers of political authority within the bloc: the growth, in other words, of what has come to be described as 'polycentrism.' There is widespread recognition that this process represents a fundamental change in the nature of world Communism as a political force on the world scene; and there is an instinctive awareness throughout Western opinion that no change of this order could fail to have important connotations for Western policy."

Polycentrism and Western Policy, Foreign Affairs, Jan. 1964, p. 172. Elsewhere in the same article, the author writes (p. 174):

"Communism has now come to embrace so wide a spectrum of requirements and compulsions on the part of the respective parties and regimes that any determined attempt to re-impose unity on the movement would merely cause it to break violently apart at one point or another."

Senator Fullbright devoted a Senate speech entitled "Foreign Policy—Old Myths and New Realities" to the same subject (110 Cong. Rec. 6227), in the course of which he said (p. 6228):

"The master myth of the cold war is that the Communist bloc is a monolith composed of governments which are not really governments at all but organized conspiracies, divided among themselves perhaps in certain matters of tactics, but all equally resolute and implacable in their determination to destroy the free world."

In similar vein, Vice President (then Senator) Humphrey, in an article for the North American Newspaper Alliance, has written that, "The 'monolithic unity' of the Communist bloc is an archaic myth to which no one even bothers to pay lip service any more." Washington Evening Star, Sept. 3, 1964. And Secretary of State Rusk, speaking before the IUE-AFL-CIO, declared that, "The Communist world is no longer a single flock of sheep blindly following behind one leader." Congressional Quarterly, Mar. 6, 1964, p. 479.⁴²

The Board's ruling that its 1953 construction of the Act is conclusive on petitioners foreclosed consideration of this mass of evidence that, " 'the world Communist movement,' as Congress meant the term in 1950 . . . has ceased to exist"

⁴² Arnold J. Toynbee recently wrote that "the monolithic solidarity of world Communism is an exploded myth." We Must Woo Red China, Saturday Evening Post, July 17, 1965, p. 10. For other expressions of similar views see, e.g.: East-West Trade, A Compilation of Views of Businessmen, Bankers, and Academic Experts, Senate Committee on Foreign Relations, 1964, pp. 220, 245, 273, 278, 284; East-West Trade, Hearings before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess., Part II, Feb. 24, 25 and 26, 1965, pp. 26-31, 60-62, 166-69, 243-44, 248-50; Report to the President of the Special Committee on U. S. Trade Relations with Eastern European Countries and the Soviet Union, U. S. Govt. Printing Office, 1965, pp. 1-2.

(*Communist Party* case at 113). If the Board's ruling is correct, the Act violates due process and is a bill of attainder. On the other hand, if the Board was wrong, the Court must reconsider the 1953 construction of section 2 in the light of present day reality.

V.

The Act unconstitutionally denies petitioners the safeguards of grand jury indictment, judicial trial and trial by jury.

Sections 7 and 15 of the Act make it a crime for a person to disobey a final order of the Board that he register as a member of an organization which it has found to be a Communist-action organization. Thus, under the scheme of the Act, the issues as to the character of the organization and the accused's membership in it are not submitted to the grand jury that returns the indictment or to the judge or petit jury that try it. Instead, the Board's determinations are conclusive for the purposes of the criminal proceeding. Moreover, the Board bases its determinations on a preponderance of the evidence and not on proof beyond a reasonable doubt (sec. 14(a)).

Accordingly, if the orders against petitioners become final, the only issue of fact in prosecutions for non-compliance will be whether petitioners have registered.

The punishment of petitioners for failing to register is without any possible justification unless they are in fact members of the Communist Party and unless the Party is in fact a Communist-action organization. Yet the Act denies petitioners the constitutional safeguards for the determination of these factual issues. It accomplishes this by framing the crime of non-registration in terms that embody the administrative determination of two of the factual issues on which criminal liability depends, thus

excluding them from consideration in the criminal proceeding. By so doing, the Act violates the guarantee of indictment by grand jury, judicial trial and trial by jury contained in the Fifth and Sixth Amendments, Art. III, sec. 2, cl. 3, Art. III, sec. 1, and Art. I, sec. 9, cl. 3. *Wong Wing v. United States*, 163 U. S. 228; Fraenkel, Can the Administrative Process Evade the Sixth Amendment, 1 Syracuse L. Rev. 173. Cf. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 165-67.

Wong Wing invalidated a statute which authorized the imprisonment of Chinese aliens who were found by a United States judge or commissioner to be in the country unlawfully. The Court held that the statute violated the Fifth and Sixth Amendments by authorizing infamous punishment without indictment by grand jury and trial by judge and petit jury. It recognized that aliens could be deported on administrative determinations of their illegal presence, but it decided that they could not be punished for the same cause without observance of the constitutional safeguards governing criminal cases.

The Act differs from the statute in *Wong Wing* in that it accords petitioners the constitutional safeguards with respect to one element of the offense, their failure to file the required registration documents. But it denies these safeguards with respect to the other two elements, the character of the Communist Party and petitioners' membership in it. The principle of *Wong Wing*, however, and the plain meaning of the Constitution make the safeguards applicable to every element of the offense. The result in *Wong Wing* would have been the same if the statute had provided for an administrative determination of the illegality of the alien's entry and had accorded him a jury trial limited to the issue of his presence in the country.

Such was virtually the situation that was presented in *United States v. Spector*, 343 U. S. 169. There, a statute

made it a crime for aliens under administrative deportation orders to fail to depart the country or to take steps to effect their departure. Under the statute, therefore, the issue of the deportability of the accused was determined administratively and not at the criminal trial. The majority of the Court did not consider whether this feature of the statute invalidated it, holding (at 172) that the question had not been raised.

Justice Jackson, joined by Justice Frankfurter, dissented on the ground that the question was properly before the Court and that the statute unconstitutionally denied an accused a judicial and jury trial on the issue of his deportability.⁴³ After reviewing the decision in *Wong Wing*, the opinion proceeds (at 177-78):

"The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. . . . If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the same manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The Act, like the self-deportation statute, subdivides the crime which it creates and submits "the vital and controversial part" of the charge—the nature of the organization and the membership in it of the accused—to conclusive administrative determination. The Act is unconstitutional for that reason.

⁴³ Justice Black, dissenting on other grounds, added of Justice Jackson's dissent (at 174, n. 1) that, "I have not seen a satisfactory reason for rejecting his view."

A statute may, of course, impose criminal penalties for violations of administrative rules or regulations, and provide that their validity may be challenged only in administrative or civil proceedings. *Yakus v. United States*, 321 U. S. 414. These principles, however, apply only to administrative rule-making, not to administrative adjudications of the acts of individuals. Justice Jackson pointed out this distinction in *Spector*, at 179.

Justice Jackson's opinion in *Spector* is not contrary to the decision in *Cox v. United States*, 332 U. S. 442, that the accused in a prosecution for violation of the Selective Service Act is concluded by the draft board's denial of an exempt classification. A draft exemption is the grant of an exceptional privilege excusing an individual from an obligation that is generally applicable to all males in his age group. Moreover, the Selective Service Act is an exercise of the war power. No exemptions are constitutionally required, and hence they may be withheld on the government's own terms,⁴⁴ one of which may be that an administrative decision denying an exemption shall be conclusive on the draftee in a prosecution for draft evasion. Cf. *United States v. Nugent*, 346 U. S. 1.

The case is different with a statute which is not of general application, does not grant a privilege but exacts an obligation, does not represent an exercise of the war power, and whose constitutionality in each case depends on the presence of certain facts. This was the situation in *Spector* where the accused could not constitutionally be required to depart the country unless his presence here was unlawful. In such a case, an administrative finding of the constitutionally prerequisite facts cannot conclude the accused in a prosecution for violation of the requirement. It was because this distinction is obvious that Justices Jackson and

⁴⁴ Provided that they do not arbitrarily discriminate, e.g., by exempting clergymen of certain denominations but not of others.

Frankfurter, who voted with the majority in *Cox*, saw no necessity for referring to it in *Spector*.⁴⁵

Petitioners' case is on all fours with *Spector*. For prerequisite to the constitutionality of the orders that petitioners register as members of the Communist Party are (1) that they are members and (2) that the Communist Party is a Communist-action organization. See the *Communist Party* case, at 104-05. Accordingly, Board determinations of these facts may not be made conclusive on petitioners in prosecutions for violating the registration orders.

The court below held (R. 69-70, n. 6) that consideration of this objection to the Act must be deferred until petitioners are prosecuted for non-compliance with the Board's orders. But under *Ex Parte Young*, *supra*, petitioners may not be required to incur the enormous criminal penalties of section 15(a) as the price of an adjudication of their constitutional contentions, but are entitled to litigate them in a civil proceeding. Since this proceeding provides the remedy to which petitioners are entitled, their constitutional challenge is not premature. See *supra*, p. 19.⁴⁶

⁴⁵ Nor did Justice Black, who agreed with the majority in *Cox* (at 455) that the accused was not entitled to a jury trial on the issue of his exemption, and also expressed his concurrence with Justice Jackson's opinion in *Spector* (at 174, n. 1).

⁴⁶ The petitioner in the *Communist Party* case argued that the Act and the order requiring it to register were unconstitutional under *Wong Wing* and Justice Jackson's opinion in *Spector*. See Brief for Petitioner, pp. 72-74. The majority (at 81) dismissed the argument as premature without consideration of the rule of *Ex Parte Young*. But see the dissent of Justice Black, at 145-46. The Communist Party renewed this constitutional attack in the prosecution for violating the order that it register. The Court of Appeals did not consider the issue but reversed the conviction on other grounds. See Brief for Respondent in Opposition in *United States v. Communist Party*, No. 1027, Oct. Term, 1963, pp. 1-2, 14, 16. See also *supra*, p. 5, n. 4.

CONCLUSION

The judgment below should be reversed with directions to set aside the orders of the Board.

Respectfully submitted,

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Appendix A—Statutes and Regulations Involved

1. Subversive Activities Control Act

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

SEC. 2 [781] * As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

* * *

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

* * *

* Numbers in brackets are the section numbers of 50 U. S. C.

Sec. 3. [782] For the purposes of this title—

• • •

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

• • •

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

• • •

Sec. 4. [783] (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

• • •

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or sec-

tion 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

* * *

SEC. 7. [786] (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

* * *

(c) The registration required by subsection (a) or (b) shall be made—

* * *

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

* * *

(4) In the case of a Communist-action organization, the name and last known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

* * *

SEC. 8. [487] (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organiza-

tion to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

• • •

Sec. 13 [792](a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall

be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

* * *

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

* * *

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(i) If after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

• • •

SEC. 14. [793] (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the

proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

. . .

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

SEC. 15. [794] (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this Title—

. . .

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

2. Regulations of the Attorney General

Order No. 250-61, issued by the Attorney General, on October 3, 1961, effective October 7, 1961, prescribing regu-

lations to carry out the provisions of sections 7, 8, 9 and 10 of the Subversive Activities Control Act, 28 C. F. R. Part 11, provides in pertinent part as follows:

Section 11.206 *Forms for registration of individuals.*

Each individual required to register pursuant to section 8(a) or (b) of the act shall accomplish such registration on a form hereby designated as Form IS-52a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D. C., and may be obtained in person or by mail.

Section 11.207 *Form for registration statement of individuals.*

Registration statements of individuals shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D. C. Filing may be made in person or by mail and shall be deemed to have taken place upon receipt thereof. Such registration statement shall be on a form hereby designated as Form IS-52, copies of which are available at the Internal Security Division.

3. Forms Prescribed by the Attorney General

Form IS-52a is as follows:

Form No. IS-52a
(Ed. 9-6-61)

Budget Bureau No. 43-R414
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE WASHINGTON, D. C.

REGISTRATION FORM FOR INDIVIDUALS

Pursuant to Section 8(a) or (b) of
the Internal Security Act of 1950

(NOTE: This form should be accompanied by a
Registration Statement, Form IS-52)

..... hereby
(Name of individual—Print or type)
registers as a member of,
a Communist-action organization.

/s/
(Signature) (Date)

.....
(Typed or printed name) (Date)

.....
(Address—type or print)

Form IS-52 is as follows:

Budget Bureau No. 43-R301.2
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

FORM IS-52

for

REGISTRATION STATEMENTS OF INDIVIDUALS
Pursuant to section 8 of the Internal
Security Act of 1950

INSTRUCTION SHEET—READ CAREFULLY

1. All individuals required to register under section 8 of the Internal Security Act of 1950 shall use this form for their registration statements.
2. Two copies of the statement are to be filed. An additional copy of the statement should be prepared and retained by the Registrant for future references.
3. The statement is to be filed with the Internal Security Division, Department of Justice, Washington, D. C.
4. All items of the form are to be answered. Where the answer to an item is "None" or "inapplicable," it should be so stated.
5. Both copies of the statement are to be signed. The making of any willful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

6. If the space provided on the form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the answer given.

FOR AN INDIVIDUAL

a. Who is a member of any Communist-action organization which has failed to file a registration statement as required by Section 7(a) of the Internal Security Act of 1950.

OR

b. Who is a member of any organization which has registered as a Communist-action organization under Section 7(a) of the Internal Security Act of 1950 but which has failed to include the individual's name upon the list of members filed with the Attorney General.

1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.

2.(a) Name of Registrant.

(b) All other names used by Registrant during the past ten years and dates when used.

(c) Date of birth.

(d) Place of birth.

3.(a) Present business address.

(b) Present residence address.

4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:

(a) List all offices so held and the date when held.

(b) Give a description of the duties or functions performed during tenure of office.

The undersigned certifies that he has read the information set forth in this statement, that he is familiar with the contents thereof, and that such contents are in their entirety true and accurate to the best of his knowledge and belief. The undersigned further represents that he is familiar with the provisions of Section 1001, Title 18, U. S. Code (printed at the bottom of this form).*

/s/
(Signature) (Date)

/T/
(Name) (date)
(Print or type)

* 18 U. S. C., Section 1001, provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Appendix B—Legislative History Relating to the Scope of Section 4(f) of the Act

The House version of the Act was H. R. 9490, 81st Cong., 2d Sess. Section 4(e) of this Bill, as it passed the House, contained the substance of what became section 4(f) of the Act. It provided:

“(e) The fact of the registration of any person under section 7 or section 8 of this Act as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (b) of this section * or for any alleged violation of any other criminal statute.”

Sections 5 and 6 of the House Bill likewise restricted the evidentiary use of the fact of registration in prosecutions for violations of the employment and passport prohibitions of these sections. Section 5(f) of the Bill provided:

“(f) The fact of the registration of any person under section 7 or section 8 of this Act as an officer or a member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsections (a) and (c) of this section.”**

Section 6(b) of the Bill provided:

“(b) The fact of the registration of any person under section 7 or section 8 of this Act, as an officer

* Section 4(f) of the Act refers to “subsection (a) or subsection (c) of this section.” Sec. 4(b) of the House Bill contained the substance of what became section 4(c) of the Act. The Bill contained no provision paralleling section 4(a) of the Act.

** Section 5(a) and (c) of the House Bill contained the substance of what appears as section 5(a) of the Act.

or a member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) of this section." *

It is clear from the inclusion of sections 5(f) and 6(b) in the House Bill that the House intended the words "any other criminal statute," as used in section 4(e), to be given a literal interpretation and to exclude offenses created by the Bill itself. Otherwise, sections 5(f) and 6(b) would have been superfluous.

The Senate version of the Act was based on S. 2311, 81st Cong., 1st Sess. As introduced, it contained no restriction on the evidentiary use of the fact of registration. But as amended in committee and passed by the Senate, the bill included a section 4(f), which provided as follows: **

"The fact of the registration of any person under section 7 or section 8 of this Act as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section." ***

The Senate Bill, however, contained no restrictions on the evidentiary use of the fact of registration in prosecutions for violations of sections 5 and 6.

The legislation as reported out by the conference committee and enacted eliminated the provisions of sections

* Section 6(a) of the House Bill was identical with section 6(a) of the Act.

** The Committee amendment appears in S. Rep. No. 1358, 81st Cong., 2d Sess., to accompany S. 2311, p. 2.

*** Subsections 4(a) and 4(c) of the Senate Bill contained the substance of the provisions of these subsections as they appear in the Act.

5(f) and 6(b) of the House Bill.* It added to the Senate version of the second sentence of section 4(f) the words, "or for any alleged violation of any other criminal statute," which were taken from section 4(e) of the House Bill. As we have seen, however, these words were never intended to be applicable to violations of sections 5 or 6.

* The Conference Report is H. R. Rep. No. 3112, 81st Cong., 2d Sess., to accompany H. R. 9490.

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1944

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 3

**WILLIAM ALBERTSON and
ROSCOE QUINCY PROCTOR**

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR NATIONAL LAWYERS GUILD,
As Amicus Curiae**

PRELIMINARY STATEMENT

The National Lawyers Guild is a national association of lawyers which, for more than 30 years, has sought to advance the interests of the legal profession, to preserve the integrity and independence of the bar, to promote law as an instrument of social justice, and to defend our priceless constitutional heritage. For these purposes, it has frequently appeared *amicus* in cases involving issues of special concern to the legal profession and in cases involving

constitutional issue having a profound and immediate bearing on the fundamental rights of every citizen. For reasons which this brief will make clear, we believe this case falls into both categories.

This brief is being filed with the written consent of all parties to the case, in accordance with Rule 42, subd. 2 of the Rules of this Court. Communications expressing this consent are printed in the Appendix.

This brief has been prepared with particular reference to the case of Roscoe Quincy Proctor, but it is believed that the argument is in principle equally applicable to the case of William Albertson.

ARGUMENT

If the order under review is based solely on the evidence taken before the Board in this proceeding, it violates First Amendment rights to freedom of speech and association. If it is based in part on other facts or supposed facts, which have not been proved with relation to petitioner Proctor personally, and which he has had no opportunity to rebut, it violates due process of law, or the prohibition against bills of attainder or both.¹

Petitioner Roscoe Proctor has been ordered to register as a member of a "Communist-action organization." In the light of the findings and definitions contained in the Act, this means he is required to register as a person who is violating Sec. 4(a) of the Act by conspiring to perform acts which would substantially contribute to the establish-

¹ The fact that the argument is limited to this point is not to be taken as any indication that the National Lawyers Guild is not also concerned with the self-incrimination problem, which we assume will be exhaustively discussed by the parties.

ment of a foreign-controlled totalitarian dictatorship, who is also violating 18 U.S.C. Sec. 2384 by conspiring to overthrow the government by force, and who is violating 18 U. S. C. Sec. 371 by conspiring to commit other federal crimes, such as espionage, sabotage, sedition, and possibly treason. It also means that he is to register as a citizen whose legal status is in some ways inferior to that of either an alien or a convicted felon, since he cannot work for the United States, for a defense facility (a concept which is capable of covering most of the labor market, since there are few industries which do not at least potentially affect a nation's ability to defend itself), or for a labor organization (Sec. 5, as amended). Even one of these disabilities standing alone—ineligibility for government employment—has been held to constitute punishment “of a most severe type.” *United States v. Lovett*, 328 U.S. 303, 316. Though these disabilities depend on the fact of membership, rather than on registration, the registration puts the public on notice that petitioner has been officially designated as a person to whom these disabilities apply. It creates an official record that Roscoe Proctor is irrebuttably presumed (*Aptheker v. Secretary of State*, 378 U.S. 500, 511) to be a person who will commit espionage and sabotage if given the chance. Furthermore, the registration, since it is required to be made public (Sec. 9), amounts to an official government-sponsored invitation, addressed to employers, prospective employers, neighbors, busybodies, self-appointed vigilantes, and the public generally, to vent upon Roscoe Proctor all the hatred and fear of “Communism” which the excitements and tensions of recent years have generated.

This Court has recently recognized that even a requirement that a single request delivery of mail which has been officially designated “communist political propaganda” is

"almost certain to have a deterrent effect." *Lamont v. Postmaster General*, 381 U.S. 301, 14 L. ed. 2d 398, 402. The deterrent effect becomes very nearly total when one is ordered to register as a potential spy and saboteur whom the public is officially invited to treat as a pariah. A deterrent effect this severe amounts to a blanket prohibition of association, which this Court has warned would endanger legitimate expression and association. *Scales v. United States*, 367 U.S. 203, 229-230. The mere fact that these disabilities and disadvantages may be explained on a preventive basis, rather than a retributive basis, does not prevent them from being punishment in a constitutional sense. *United States v. Brown*, 381 U.S. 427, 14 L. ed. 2d 484, 497. And the fact that the statute may flow from Congressional desire to protect national security will not save it if it unduly infringes constitutionally protected freedoms. *Aptheker v. Secretary of State*, 378 U.S. 500, 509.

That such a registration will be profoundly damaging to petitioner Proctor is obvious. Indeed, the Act shows on its face that the registration was known to have, and intended to have, a drastically punitive effect. When an organization registers, the names of individuals are not to be published until they have had notice and an opportunity to deny the organizational connection (Sec. 9(b)). An elaborate procedure is set up by which those able to prove non-membership in the affected organizations can get their names removed from the official blacklist (Secs. 7(g), 13(b), 13(i), 14(a)). If the Act were genuinely regulatory, rather than penal and prohibitory in substance and intent, such provisions would not have been thought necessary—or even thought of at all.

Yet all that this record shows—indeed all it attempts or purports to show—is that petitioner was one of a num-

ber of persons known to the witnesses as Communists who worked together for perfectly lawful and proper goals, such as peace and civil rights, and in carrying on the normal internal functions which are essential to the existence of any voluntary association.

If the registration is deemed to follow merely from the facts shown in this record, then petitioner Proctor, in violation of the First Amendment, is being punished for constitutionally protected activities.

This Court, in *DeJonge v. Oregon*, 299 U.S. 353, unanimously held that the peaceful advocacy of perfectly lawful positions on public policy is constitutionally protected notwithstanding the fact that the persons engaging in it may be Communists—and that this is true even on the assumption that Communists are also engaged in unprotected or even unlawful activities. The principle established by this case has not been overruled or by-passed. On the contrary, this Court has continued to insist that this line of demarcation is constitutionally required and must be sharply drawn in each context in which the problem arises. Thus, mere membership in the Communist Party does not justify an inference that an individual shares all its beliefs, *Schneiderman v. United States*, 320 U.S. 118, 136, or that he shares the evil purposes of other members or participates in their possibly unlawful conduct. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 246. It does not justify an inference as to the individual's specific intent. *Yates v. United States*, 354 U.S. 298, 331. This Court has held that the relationship between the conduct or status punished and the activity justifying regulation "must be sufficiently substantial to satisfy the concept of personal guilt." *Scales v. United States*, 367 U.S. 203, 224-225. It has warned against employing the concept of membership in such a

way as to give rise to a danger that a person "might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States*, 367 U.S. 290, 299-300. In *Aptheker v. Secretary of State*, 378 U.S. 500, all these strands were woven together to demonstrate that making a deprivation turn on mere membership, excluding "plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes," (*id.* at 514) necessarily violates the principle that regulations affecting basic freedoms must be narrow and precise.

There is not a shred of evidence in this record to suggest that petitioner Proctor has personally engaged in, or even been personally aware of, any activities which would not be constitutionally protected under the above standards.

On the other hand, if this registration order is deemed to be justified in part by facts not found in this record, then petitioner has been deprived of due process of law, both because such facts were not proved against him, *Garner v. Louisiana*, 368 U.S. 157, *Thompson v. Louisville*, 362 U.S. 199, and also because he was given no opportunity to rebut them. *Heiner v. Donnan*, 285 U.S. 312, 325; *Mobile, J. & K C. RR. Co. v. Turnipseed*, 219 U.S. 35, 43; *Bailey v. Alabama*, 219 U.S. 219, 239; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 300-305.

Such a profoundly detrimental status as that to which petitioner is assigned by this registration order cannot be justified by anything short of a showing that the individual is a potential spy and saboteur. We submit that it is plain from the face of the Act that this is the supposed justifi-

cation. The reasoning may be expressed in the form of a syllogism, as follows:

MAJOR PREMISE: All Communists are potential spies and saboteurs.

MINOR PREMISE: Roscoe Proctor is a Communist.

CONCLUSION: Therefore, Roscoe Proctor is a potential spy and saboteur and should be required to register as such.

The peculiar feature of this is that, though both premises are required to justify the result, it is only the minor premise which the government is required to prove—and only the minor premise which the petitioner has been given an opportunity to rebut.

If the major premise is sought in the legislative findings, the Act, as so applied, is clearly a bill of attainder. *United States v. Brown*, 381 U.S. 437, 14 L. ed. 2d 484. Since Congress cannot constitutionally determine that members of the Communist Party are likely to incite political strikes (*id.*, 15 L. ed. 2d 484, 492-493 n 24), it cannot constitutionally determine that they are likely to commit espionage or sabotage.

Nor may the major premise be derived from facts proved or found in the Communist Party registration proceeding.

The taking of testimony in that proceeding closed on July 1, 1952 and was never reopened except for further consideration of matter going to the credibility of witnesses previously heard. The Board's finding rested in substantial measure on evidence of pre-1940 activities. This Court has refused to decide the rights of organizations on a stale record. *American Committee for Protection of Foreign Born v. Subversive Activities Control Board*, 380 U.S. 503; *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, 380 U.S.

513. Surely Roscoe Proctor cannot be deprived of his constitutional rights on the basis of evidence which is even more stale, and which was taken in a proceeding to which he was not a party.

Surrounding circumstances have greatly changed since July 1, 1952. The personnel of the Communist Party must have greatly changed also, especially since the Krushchev revelations about Stalin and the Hungarian uprising which occurred during the interval. It can scarcely be presumed that the Communist Party's activities have remained stable and unchanging, despite changing personnel and circumstances, over so long a period.² Nor can it be presumed that the Party's activities have been utterly unaffected by intervening legal developments suggesting that certain activities might tend to subject both the Party and its members to drastic legal consequences.³ The presumption of continuance is not a rule of law "to be applied in all cases, with or without reason." *Maggio v. Zeitz*, 333 U.S. 56, 65.

Insofar as findings, whether legislative or administrative, look to the future "they can be no more than prophecy and are subject to be controlled by events. A law depending on the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *Chastleton Corp. v. Sinclair*, 265 U.S. 543, 547-8.

² The record in this case shows that the Communist Party of 1962 operated under the Constitution of 1967 as amended at the national convention in 1959 (Atty. Gen'l's Exhibit No. 1).

³ The Act does not provide any method by which an unregistered organization can obtain a redetermination of its status, nor any method by which a member may seek a redetermination of his organization's status.

Both the Act and the Board's findings in the Communist Party registration case are based on the theory that the world communist movement is both monolithic and unicentered. That theory, however reasonable it may have seemed when the Act was passed or when the Board rendered its findings, does not fit the world revealed by subsequent history. The theory assumes that no country can go Communist without necessarily (almost by definition) falling under the control of the Soviet Union. Yet China went Communist and is not under the control of the Soviet Union. The theory assumes that no national Communist Party is free to reject the policies put forward by Russian Communist leaders. Yet the Albanian Communist Party did exactly that by siding with the Chinese Communist leaders against the Russians. What it in fact did it must somehow have been free to do. A theory which confidently proves the impossibility of what is happening before our eyes is scarcely a sufficient basis for justifying drastic inroads on our traditional and constitutionally-protected liberties—no matter how many legislators and administrators may have endorsed it.

Yet without this theory we have no assurance that there is any such thing today as a "Communist-action organization," as that term is defined in the Act. The Act is not framed to reach *any* foreign domination, or even domination by *any* Communist government. It requires direction, domination, or control by "*the* foreign government or foreign organization controlling the world Communist movement referred to in section 2". (Sec. 3) The Board construed this as a specific reference to the Soviet Union and this Court affirmed that construction. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 112-113. A Communist organization in the United States which followed the Chinese view would *not* fit this defini-

tion—notwithstanding the fact that the Chinese “line” is much less favorable to the United States than is the Russian. Furthermore a Communist organization free to choose between the Chinese view and the Russian (or to adopt some third alternative) would not be within the purview of the Act—no matter which choice it made.

In any case, even if the findings were fresh, based on contemporaneous evidence, and not in conflict with the observed facts, the inescapable fact would still remain that those findings were not rendered in any proceeding to which Roscoe Proctor was a party and they are therefore not binding on him. “The principle which protects a person against the operation of judicial proceedings to which he is not a party is one of universal jurisprudence, because it is the dictate of common justice.” *Renaud v. Abbott*, 116 U.S. 277, 288.

The pretense that we are not punishing the heretic for his opinions, but are only guarding against the misconduct which his opinions might lead him to commit, is the most ancient and threadbare rationalization of persecution. It is the very hallmark of bigotry. Lord Macauley wrote more than a century ago:

If such arguments are to pass current, it will be easy to prove that there never was such a thing as religious persecution since the creation. For there never was a religious persecution in which some odious crime was not, justly or unjustly, said to be obviously deducible from the doctrines of the persecuted party * * *

The true distinction is perfectly obvious. To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man because we infer from the nature of some doctrine which he holds, or from the conduct of other per-

sons who hold the same doctrines with him, that he will commit a crime, is persecution, and is, in every case, wicked and foolish.

(Historical Essays, London, 1932, pp. 7-8, emphasis added).

It is fundamental to our system that guilt—and merit—is personal. Yet this record tells us nothing about the personal merits of Roscoe Proctor. Indeed it systematically excludes all such material. To try a man in this manner is to deny him any meaningful hearing.

The proceedings under review does not treat Roscoe Proctor as a human being. It treats him as a faceless integer, without qualities or attributes other than an organizational membership. It is not a proceeding in which Roscoe Proctor has been tried. It is a proceeding in which he has been categorized and assigned to a most uncomfortable and injurious pigeon-hole. It is an adjudication, not of conduct, but of status.

We submit that such a proceeding is entirely incompatible with our whole legal and constitutional tradition and that it violates constitutional guarantees of freedom of speech and association, due process of law, and protection against legislative exercise of the judicial function.

Respectfully submitted,

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Counsel for Amicus Curiae,
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Detroit 26, Michigan.

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936 Shevlin Drive,
El Cerrito, California,
Of Counsel.

It is a very common mistake to suppose that the only way to get rid of a bad habit is to try to suppress it. This is a very dangerous error, for it is almost certain that the habit will return with increased force. The only safe way to get rid of a bad habit is to replace it by a good one. This is the principle of the "substitution" method. For example, if a man has a bad habit of drinking alcohol, he should not try to suppress it, but rather to replace it by a good habit, such as drinking water or tea. This is the only way to get rid of a bad habit for good.

The substitution method is a very simple and effective way to get rid of a bad habit. It is based on the principle that the mind is like a muscle, and like a muscle, it can be trained to do what it wants to do. If a man has a bad habit, he should train his mind to do something else. For example, if a man has a bad habit of smoking, he should train his mind to do something else, such as reading or walking. This is the only way to get rid of a bad habit for good.

We should not think of a bad habit as a thing that is fixed and unchangeable. It is a thing that can be changed, and it can be changed in a very simple and effective way. The substitution method is the only way to get rid of a bad habit for good.

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APPENDIX

OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530

August 6, 1965

James Lafferty, Esq.
Executive Secretary
National Lawyers Guild
Cadillac Tower
Detroit, Michigan 48226

Re: Albertson and Proctor v. United States
October Term 1965 (No. 3)

Dear Mr. Lafferty:

In reply to your letter of August 2, 1965, I am writing to advise you that the government consents to the filing of a brief *amicus curiae* in the above-captioned case on behalf of the National Lawyers Guild.

Sincerely,

/s/ Ralph S. Spritzer
Acting Solicitor General

FORER and REIN
Attorneys at Law

August 10, 1965

James Lafferty, Executive Secretary
National Lawyers Guild
Cadillac Tower
Detroit, Michigan 48226

Re: Albertson & Proctor v. Subversive Activities
Control Board, No. 3, Oct. Term, 1965

Dear Mr. Lafferty:

Mr. Abt has asked me to reply to your letter to him of August 2.

The petitioners in the above case hereby consent to the filing of an *amicus* brief by the National Lawyers Guild.

Sincerely,

/s/ Joseph Forer





LE COPY

Office-Supreme Court, U.S.
FILED

AUG 27 1965

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 3

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,

Petitioners,

—v.—

SUBVERSIVE ACTIVITIES CONTROL BOARD.

**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
*AMICUS CURIAE***

AMERICAN CIVIL LIBERTIES UNION

Amicus Curiae

OSMOND K. FRAENKEL

120 Broadway

New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 3

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,
Petitioners,

—v.—

SUBVERSIVE ACTIVITIES CONTROL BOARD.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

This brief is submitted on consent of the parties filed with the Clerk. The American Civil Liberties Union is a nationwide organization devoted to the implementation of the guarantees of liberty and freedom from discrimination embodied in the Constitution and laws of the United States and the various states. We are interested in this case because it involves First Amendment rights as well as the privilege against self-incrimination.

Statement of the Case

Petitioners were found by the Subversive Activities Control Board to have been members of the Communist Party and were ordered to register as such. The Court of Appeals for the District of Columbia Circuit sustained the order.

Both in the hearings before the Board and in the petition for review petitioners challenged the constitutionality

of the law and claimed that to require them to register would violate their privilege against self-incrimination. The Court below rejected the constitutional arguments and held that the self-incrimination contention was premature, relying on this Court's decision in *Communist Party v. SACB*, 367 U. S. 1. We respectfully urge that the *Communist Party* case is not controlling on either issue.

POINT I

With respect to the issue of self-incrimination.

It is, of course, correct, as the Court below has said, that in the *Communist Party* case this Court refused to rule on the issue of self-incrimination, holding that it should await the raising of such issue in a prosecution for failing to register. But the conclusion of the Court below that the same rule of abstention is applicable here cannot be sustained.

In the first place, the basic issue of the impact of the privilege on this very registration statute was considered in *Communist Party v. United States*, 331 F. 2d 807, certiorari denied 377 U. S. 968. It is true that a new trial was ordered in that case, but only to give the government an opportunity to show that some one was available to the Party to sign the necessary documents who would not claim any privilege since the regulations permitted action on behalf of the organization. No such escape from the privilege exists in the case of an individual since it is he and he alone who must sign.

Moreover, the reason which led this Court to refrain from deciding the issue in the earlier case was an uncertainty

whether or not, or in what manner, the privilege would be claimed. Here there can be no uncertainty on this head since each petitioner expressly claimed his privilege both before the Board and in the Court below and it was rejected by the Attorney General as without merit. To require petitioners, under these circumstances, to risk criminal prosecution with the cumulative sanctions provided would be a mockery of justice.

That the claim is constitutionally valid can hardly be disputed in the light of cases such as *Blau v. United States*, 340 U. S. 159, *Brunner v. United States*, 343 U. S. 918, and *Quinn v. United States*, 349 U. S. 155. There can be no doubt, moreover, that Congress' attempt to circumvent the privilege by the addition of Section 4(f) must fail since no immunity is granted, but merely a ban on the use of the testimony. A similar ban was held insufficient to bar the privilege in *Counselman v. Hitchcock*, 142 U. S. 547. See *Ullman v. United States*, 350 U. S. 422.

The law should, therefore, be held unconstitutional as applied to individual members who have, in timely fashion, claimed their privilege. Accordingly, they should not be required to register.

POINT II

With respect to the First Amendment.

If the orders under review are sustained petitioners will be required to disclose their political association contrary to their desire to keep this private. We submit that no such invasion of First Amendment rights should be permitted barring a showing of grave public necessity, and that no such showing exists here or has even been attempted.

When this Court has upheld convictions based on the refusal of persons to answer questions about Communist affiliations before Congressional committees (*Barenblatt v. United States*, 360 U. S. 109; *Wilkinson v. United States*, 365 U. S. 399; *Braden v. United States*, 365 U. S. 431), it has been because of the importance of preserving the right of such committees to obtain information which they claimed was required for a legislative purpose.

But no such considerations exist here. No conceivable public purpose can be advanced to require a person to admit membership in any particular organization, especially when an administrative agency has made a public finding on the subject. Any conceivable public interest in knowledge about such membership is satisfied by the administrative finding. In the *Communist Party* case, 367 U. S. at 96-105, the obligation to register was upheld on the theory that Congress had the right to require an organization under foreign domination to make public certain information about itself which, of course, would not be provided by the mere finding of the Board that the organization was of the proscribed character. Here registration would add nothing to what the Board has already found.

Moreover, if the person cited has denied alleged membership, is he nevertheless forced to recant by the act of registering if the Board rules against him? Does not the registration requirement assume the infallibility of the administrative process? After all, the Board might erroneously have determined the fact of membership. The same problem could arise in connection with the character of an alleged Communist-action organization.

CONCLUSION

We submit, therefore, that the orders under review should be set aside.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
Amicus Curiae
OSMOND K. FRAENKEL
120 Broadway
New York, N. Y.

August, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 3

**WILLIAM ALBERTSON AND ROSCOE QUINCY PROCTOR,
PETITIONERS**

SUBVERSIVE ACTIVITIES CONTROL BOARD

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 62-73) is reported at 332 F. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1964 (R. 74). The petition for a writ of certiorari was filed on July 10, 1964, and certiorari was granted on May 17, 1965. 381 U.S. 910. The jurisdiction of this court rests upon 28 U.S.C. 1254(1) and Section 14(a) of the Subversive Activities Control Act of 1950, 50 U.S.C. 793(a).

QUESTIONS PRESENTED

The Subversive Activities Control Act of 1950 provides for the registration of any member of an organization which has been found by the Subversive Activities Control Board to be a "Communist-action organization" and which itself has failed to register under the Act. The Communist Party has been found to be such an organization, but it has not registered. Both petitioners were found by the Board to be members of the Communist Party and were ordered to register. The questions presented are:

1. Whether the orders directing petitioners to register violate their constitutional privilege against self-incrimination.
2. Whether the registration requirements are irrational.
3. Whether compulsory registration unconstitutionally infringes upon the protected rights of free speech and association.
4. Whether petitioners were subjected to bills of attainder or were denied due process of law because they were not permitted to relitigate before the Board its prior finding as to the character of the Communist Party.
5. Whether petitioners have a constitutional right to trial upon indictment, by a jury, and in judicial proceedings on the question whether the Communist Party is a "Communist-action organization" within the meaning of the Act.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Subversive Activities Control Act, 50 U.S.C. 781, et seq., and the applicable regulations are set forth in Appendix A, pp. 49-63, *infra*.

STATEMENT

On May 31, 1962, pursuant to Section 13(a) of the Subversive Activities Control Act of 1950, 50 U.S.C. 792(a), the Attorney General filed petitions with the respondent Board for orders requiring petitioners to register under Section 8(a) of the Act as members of a Communist-action organization, i.e., the Communist Party of the United States of America. The petitions alleged: (1) that a final order requiring the Communist Party to register under Section 7(a) of the Act as a Communist-action organization was in effect (having been published in the Federal Register on October 21, 1961); (2) that more than sixty days had elapsed since the order became final, but the organization had not registered; (3) that petitioners were members of the organization and were therefore required to register under Section 8(a) of the Act; and (4) that petitioners had failed to do so.¹

Petitioners' answers (R. 5, 33) stated, *inter alia*, that Sections 8 and 13 of the Act violate the Fifth Amendment privilege against self-incrimination.

Petitioners have raised no factual issues pertaining to their membership in the Communist Party. Consequently, we have not set out the allegations or findings made in the course of the Board proceedings. The allegations appear at pages 2-4 and 30-32 of the Record. The Board's findings of fact are at pages 14-24 and 42-50.

¹ Each petitioner had been elected a member of the Communist Party. See R. 14-24, 42-50.

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(which petitioners "hereby assert[ed]"), as well as the First, Fifth, and Sixth Amendments, and that they deprived petitioners of their constitutional right to trial by jury and constituted a bill of attainder.

After full hearings, at which petitioners offered no evidence (other than one exhibit in the *Albertson* case), the Board found that petitioner Albertson was at the time of the hearing, and had been, since at least 1960, a member of the Communist Party (R. 25). The Board also found that petitioner Proctor was and had been, since at least the end of 1959, a member of the Communist Party (R. 50).^{*} The Board also found that a final order requiring the Communist Party to register as a Communist-action organization had been in effect since October 20, 1961, and that the Party had not registered (R. 25, 57). Accordingly, the Board issued orders requiring Albertson (R. 26) and Proctor (R. 58) to register.

Petitioners sought review of these orders in the court of appeals pursuant to Section 14(a) of the Act (R. 27-29, 59-61). The court of appeals affirmed the Board's orders on the ground that the self-incrimination claim was not ripe for review (R. 66-69) and that most of the other contentions were resolved adversely to petitioners in *Communist Party v. Sub-*

^{*} Each petitioner had been elected a member of the National Committee of the Communist Party at the last National Convention of the Party in December 1959; each served in that office and held various offices at local and State levels in the Party; each attended meetings of National Committee and of local and State groups of the Party at which they reported on and discussed matters of Party policy; and each imparted to members information from the Party leadership with respect to Party programs and activities. See R. 14-24, 42-50.

versive Activities Control Board, 367 U.S. 1 (R. 71-72).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, in its present posture, involves the validity of two orders of the Subversive Activities Control Board, each of which directs one of the petitioners to "register under and pursuant to section 8 (a) and (c) of the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization * * *" (R. 26, 58). The orders do not prescribe any particular form of registration nor do they direct petitioners to supply any specific information. On their face they require nothing more than bare "registration," and it is in light of this narrow command that their validity must be determined.

We emphasize at the outset what this case does not presently involve because we believe that confusion regarding the effect of the Board's orders has misled petitioners as well as the court of appeals. The forms appended to petitioners' brief (pp. 65-68) are the official forms currently prescribed by the Attorney General for the registration of individuals under Section 8 of the Subversive Activities Control Act. Two separate documents are involved. One is IS-52a, the Registration Form, on which the prescribed act of registration is performed. The second is IS-52, the Registration Statement, on which the registrant is asked to supply personal data and other information. But the Registration Form is not established by statute, and compliance with the registration requirement can, presumably, be achieved by registration in a form

differing from Form IS-52a.¹ Nor have petitioners responded to the specific requests for information contained in either the Registration Form or in the Registration Statement. They have, however, asserted the Fifth Amendment privilege against self-incrimination before the Board in response to the Attorney General's demand that they register. Consequently, we believe that to the extent petitioners contend that any form of compulsory registration adequate to satisfy the standards of Section 8 would violate their Fifth Amendment privilege, their claim is now ripe for adjudication. Insofar, however, as they challenge any particular inquiry made on the Registration Form or Statement, their contention is premature.

The registration provisions of the Subversive Activities Control Act were drawn and enacted "to [e]ffect disclosure of the identity and propaganda of individual Communists and Communist organizations." S. Rep. No. 1358, 81st Cong., 2d Sess. (1950), p. 7. The draftsmen of the Act contemplated that disclosure would be accomplished principally by the registration of Communist action and Communist

¹The Act requires the Registration Statement to be "prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe." Section 8(c). But no similar provision exists with regard to the Registration Form, so that compliance with the bare registration requirement of the statute could be achieved in a manner other than by Form IS-52a.

front groups with the Attorney General. These groups, being obliged to register under Section 7 of the Act, are required by that Section to accompany their registrations with statements listing, *inter alia*, their officers and, in the case of Communist-action organizations, the names and addresses of all their members. If a Communist-action organization fails to register, the Subversive Activities Control Board is authorized, at the request of the Attorney General and pursuant to an evidentiary hearing, to determine that the organization is legally obligated to register and order it to do so. Section 13 (g) (1). It is only if the organization thereafter fails to comply with such an order * that its individual members come under a duty to register personally. If an individual fails to do so, the Board is empowered, again upon petition by the Attorney General, to conduct a public evidentiary hearing to determine whether or not the individual is a member of the organization which has been determined to be a Communist-action organization. If the Board finds "that an individual is a member of a Communist-action organization * * * it shall make a

* The history and structure of the Act was discussed in detail in our brief in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, No. 12, O.T. 1960, at pp. 45-84. For the convenience of the Court we have reprinted that discussion (with some revisions) as Appendix B, pp. 64-98, *infra*.

* The order is judicially reviewable and does not become final until after appellate proceedings are concluded. Section 14.

report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under [Section 8] * * *." Section 13(g)(2).

Registration is the linchpin which holds together the statutory mechanism. Section 9 of the Act empowers the Attorney General to maintain public registers containing (1) the names and addresses of Communist-action and Communist-front organizations, (2) the registration statements and annual reports of such organizations, and (3) the registration statements of individuals registered as members of Communist-action organizations. Nothing in the Act empowers the Attorney General to include in such registers or lists any unregistered organizations or individuals, even if they have been determined to be Communist-action organizations, or members of such organizations, by the Board. In other words, the act of registration—whether voluntary or compelled—is both the necessary and sufficient condition for inclusion on the Attorney General's registers. And the registers are the means chosen by Congress to effectuate the public disclosure which was deemed necessary.

1. Petitioners' claim that the registration requirement violates the Fifth Amendment privilege against self-incrimination is premature in part, and is otherwise unsound on the merits. To the extent that petitioners fear that responses to specific inquiries on the Registration Form or Statement may compel them to incriminate themselves, they must claim the privilege with respect to the particular questions on the forms—

a step which they have not yet taken. Consequently, all that is involved at this stage is the question whether the bare act of registration and the requirement that they submit the form and statement encroaches upon Fifth Amendment rights. Since compulsory registration is not an admission of any kind, much less a confession of criminal conduct, the signing of petitioners' names does not subject them to any danger of incrimination. Moreover, Section 4(f) of the Act explicitly manifests Congress' intention not to have the act of registration available as an admission in any criminal prosecution. And since registration follows a Board determination that the registrant is a member of a Communist-action organization, mere registration "as a member" cannot supply any "investigatory lead" for further incriminatory evidence.

2. There is no merit to petitioners' argument that the registration requirement is irrational. Congress may well have believed that both those who register voluntarily and those who do so under compulsion should be required personally to perform the act. Furthermore, the registration requirement is a means whereby to obtain further information through the accompanying Registration Statement, and to keep the list current by requiring notification of changes of addresses.

3. No First Amendment liberties are impaired by the registration requirement. Contrary to petitioners' contention, the act of registration is not a compelled declaration of political belief. Nor is the disclosure attendant upon registration any more of a discouragement.

ment to free and lawful association with Communist-action groups than the membership-disclosure requirement imposed on the organization itself, which this Court sustained in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1.

4. The Board was not required to permit petitioners to relitigate the status of the Communist Party, which had been adjudicated in 1953 in the Board proceeding involving that organization. The Act requires individual members of noncomplying Communist-action groups to register, and the finding regarding the organization's status is deemed binding in proceedings involving individual members. Any other course would be grossly impractical. In light of the manifold problems which would arise in the administration of the Act if such findings could be relitigated, the Board could reasonably assume that, in the absence of any showing to the contrary, its initial finding remained valid.

5. The claim that petitioners should be granted a jury trial on the underlying facts found by the Board in this proceeding and in the *Communist Party* case are premature at this juncture. Petitioners have not yet been charged with failing to obey the Board's orders. In any event, such a rule would be contrary to established principles of administrative law. Those who are charged with having violated orders of administrative agencies which have been reviewed and affirmed in the courts are not entitled to relitigate the validity of the underlying orders in their criminal trials.

ARGUMENT

I

COMPELLED REGISTRATION UNDER SECTION 8 DOES NOT VIOLATE PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioners' first contention is that the orders directing them to register pursuant to Section 8 encroach upon their Fifth Amendment privilege against self-incrimination (Br. 15-32). The court of appeals rejected this claim as premature because denial of the privilege had not been "pressed to the point of criminal prosecution" (R. 69). We believe, for the reasons stated below, that petitioners' self-incrimination claim is premature only to the extent that it is broadly asserted to bar any and all inquiries made on the Attorney General's registration form and accompanying statement. However, insofar as petitioners resist the Board's power to compel them to register under the statute and the general statutory authority to require them to submit a statement, their assertion of the privilege is ripe for adjudication. On its merits, the claim is unsound because the "registration" contemplated by the statute—when done under compulsion of a Board order based upon independent evidence of membership—is a neutral act which cannot incriminate the registrant. And while petitioners may be able to assert valid claims of privilege to particular questions on the accompanying registration "statement"—or, indeed, to information requested on the registration form itself—they cannot, by invoking the privilege at the outset, avoid the obligation of responding

to the questions and asserting the privilege with regard to specific inquiries.

A. PETITIONERS' ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IS PREMATURE TO THE EXTENT THAT IT RELATES TO POSSIBLE INQUIRIES ON THE REGISTRATION FORM AND STATEMENT

This case arises out of review proceedings instituted by petitioners to set aside administrative orders requiring them to register pursuant to provisions of federal law directing registration "as a member of [a Communist-action] organization" and the submission of registration statements. In answer to the Attorney General's petition for a Board order directing registration in compliance with the statute, petitioners expressly asserted their Fifth Amendment privilege against self-incrimination (R. 5, 33). The Attorney General's petition did not request nor did the Board's order command that any particular inquiries be answered or that specific information be supplied. Petitioners are now seeking review of orders which merely direct them to "register" and to submit a statement. They have not claimed the constitutional privilege with respect to any particularized request for testimony; the only specific act that the statute prescribes is that each "register with the Attorney General as a member" of the Communist-action organization, and that the registration "be accompanied by a registration statement." Sections 8(a), 8(c). Obviously petitioners cannot claim any privilege beyond what they have been ordered to do, and to the extent that their claim anticipates inquiries

to the extent that their claim anticipates inquiries

made on the registration form or statement, it is premature. *Rabinowitz v. Kennedy*, 376 U.S. 605, 610.

The prematurity of the claim in this regard becomes apparent if the various possibilities which may render it purely hypothetical are considered.* First, the registration forms may be altered by the Attorney General before petitioners are finally compelled to register. Second, the Attorney General (or his delegate, see p. 58, *infra*) may accept as sufficient registration for purposes of the statute a document which does not comply, in every detail, with Forms IS-52 and IS-52a. Third, if and when a claim of privilege is made with respect to some specific request for information contained on the forms, the Attorney General may decide, in light of "his personal perception of the peculiarities of the case" (*Ex parte Irvine*, 74 Fed. 954, 960, quoted in *Hoffman v. United States*, 341 U.S. 479, 487), to honor the claim.

Nor, in the present posture of the case, is a court which is called upon to rule on the validity of petitioners' claims of privilege able to perform its function—to determine "[a]s to each question to which a claim of privilege is directed * * * whether the answer to that particular question would subject the witness to a 'real danger' of further crimination." *Rogers v. United States*, 340 U.S. 367, 374. Petitioners have not, for example, specifically invoked the Fifth Amendment privilege with regard to their pres-

* In enumerating these contingencies we lay to one side the possibility that petitioners will not assert the privilege with regard to each and every question. That, too, is a condition which renders the claim premature at this juncture.

ent business and residence addresses or with respect to the inquiry concerning their dates of birth. Whether or not this identifying information presents "a reasonable danger of further crimination in light of all the circumstances * * *" (*ibid.*) can and should be determined not when the privilege is asserted, as it is here, in anticipation of a whole range of questions which *may* be asked in the future. At that point the controversy is entirely hypothetical, and the surrounding circumstances which are relevant in assessing the merits of any privilege claim are still unknown.

Petitioners now occupy, we believe, the same position as witnesses summoned by an administrative agency to testify or to produce documents. Such witnesses may "challenge the summons on any appropriate ground" and assert "constitutional or other claims" in an enforcement proceeding instituted by the agency (*Reisman v. Caplin*, 375 U.S. 440, 449, 445), even if they are under no immediate danger of suffering criminal punishment for disobedience of the summons. See, for example, *United States v. Powell*, 379 U.S. 48, and *Federal Communications Commission v. Schreiber*, 381 U.S. 279, where challenges to administrative orders of this sort were considered on their merits even though the agency had not yet pressed its demand for information "to the point of criminal prosecution" (R. 69). And this Court's approval in *Reisman v. Caplin*, 375 U.S. 440, 445, of decisions such as *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (C.A. 2), and *Falsone v.*

United States, 205 F. 2d 734 (C.A. 5), which involved the doctor-patient privilege and an accountant's claim of privilege, demonstrates that it is permissible to assert testimonial privileges at this juncture if all conceivable complying disclosures would violate such a privilege. See also *Shaughnessy v. Bacolas*, 135 F. Supp. 15, 17-18 (S.D. N.Y.).

But that does not mean that a witness who has been summoned by an agency to testify or to produce records may employ a testimonial privilege as a threshold bar to all inquiry merely because some of the questions which will probably be asked would encroach on a constitutionally privileged area. Even if the witness has good reason to believe that incrim-

Such challenges are, of course, unavailable at this stage if the governing statute contains no provision for judicial review prior to the institution of a criminal proceeding for disobedience. In Selective Service cases, for example, where Congress has determined that dispatch in the processing of registrants is of paramount importance, orders of the administrative boards are not reviewable at any time before the registrant engages in the conduct made criminal by statute. *Falbo v. United States*, 320 U.S. 549, 554-555. Consequently, any claim made prior to the criminal proceeding is "premature" under the statutory scheme. In the present case, however, the statute provides for judicial review of a Board order to register, and it stays the effective date of the order until the review proceedings are completed. Section 14(b). Hence the claim made here, like any other contention that the order is invalid, may be heard and determined by the reviewing court. The same distinction explains the rule applicable to district court orders to witnesses to testify in proceedings before the court or grand jury. Such orders are simply not appealable at that juncture; consequently, claims of privilege must await the review of a contempt judgment. *Alexander v. United States*, 201 U.S. 117; *Cobbledick v. United States*, 309 U.S. 323.

inatory information will be sought, he must comply with the summons and assert the privilege as the questions are asked. *In re Turner*, 309 F. 2d 69, 71-72 (C.A. 2); *Application of Daniels*, 140 F. Supp. 322, 328 (S.D.N.Y.); *Shaughnessy v. Bacolas*, 135 F. Supp. 15, 17 (S.D.N.Y.); *In re Minker*, 118 F. Supp. 264, 266 (E.D. Pa.), reversed on other grounds, 217 F. 2d 350, affirmed *sub nom. United States v. Minker*, 350 U.S. 179; see *Hubner v. Tucker*, 245 F. 2d 35, 42 (C.A. 9); *Marcello v. United States*, 196 F. 2d 437, 441 (C.A. 5). As this Court observed in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 108: "[I]t is not and has never been the law that the privilege disallows the asking of potentially incriminatory questions or authorizes the person of whom they are asked to evade them without expressly asserting that his answers may tend to incriminate him." See, also, *Hutcheson v. United States*, 369 U.S. 599, 619.

Under these principles petitioners' claims of privilege are now ripe for adjudication only to the extent that they challenge the Board's power to compel the bare act of registration and the submission of an accompanying statement. With respect to these two requirements, petitioners have expressly asserted the privilege and these claims have been overruled by the Board's orders directing them to register and to submit the accompanying statements. Those decisions of the Board, like its underlying findings that petitioners

are members of Communist-action organizations, can be fully considered and determined by a reviewing court and are relevant to the ultimate question to be decided by such a court—whether the Board's order ought to be affirmed or set aside. Section 14(a).

We disagree, therefore, to this limited extent, with the court of appeals' conclusion that petitioners' self-incrimination claims are premature. In *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 105-110, upon which the court below relied, no actual claim of privilege had ever been made by any individual. This Court's holding that the claim of self-incrimination was premature was based on the observation that "[t]here is no indication that in the past [the Communist Party's] high-ranking officials have sought to conceal their identity, and no reason to believe that in the future they will decline to file a registration statement whose whole effect, in this regard, is further to evidence a fact which, traditionally, has been one of public notice." 367 U.S. at 107. Hence the claim that registration would encroach on individual Fifth Amendment rights was entirely hypothetical. Here, however, the privilege against self-incrimination has been distinctly invoked with regard to registration and submission of statements by specific individuals who were proceeded against by the Attorney General, and the Board has overruled these claims. We agree that there is no reason to defer until some future criminal prosecution the question

These statements are all or substantially all of the statements made by the individuals named in the registration statement and are not to be used in any criminal proceeding.

whether coerced compliance with the Board's order would violate the asserted constitutional rights.²

B. NEITHER COMPULSORY REGISTRATION *PER SE* NOR THE OBLIGATION TO SUBMIT A "STATEMENT" VIOLATES PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioners' contention that compulsory registration violates the constitutional privilege against self-incrimination rests on the premise that "the Act, the Board's orders and the forms and regulations of the Attorney General compel petitioners to acknowledge that they are members of the Communist Party" (Br. 21-22). For the reasons stated above (pp. 12-14, *supra*), we believe that what may be compelled by the forms of the Attorney General is not involved in this case at the present juncture. The presently rele-

² We also note that if the orders to register and to submit statements are affirmed, petitioners will not be compelled "to risk life sentences if they are to secure a determination of their constitutional rights" (Pet. Br. 18) with respect to the specific inquiries on the registration form and statement. The Act provides a five-year term of imprisonment and a \$10,000 fine for "failure to * * * register or to file any * * * registration statement * * *." Section 15(a)(2). It is doubtful whether an individual who had registered and filed a statement but was contesting the validity of certain claims of privilege made on the form could be said to have "failed" to register or file. Cf. *Reisman v. Caplin*, 375 U.S. 440, 446-447. In any event, the provision which authorizes the cumulation of penalties states that "each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense." (Emphasis added.) Consequently, the failure to file a Registration Statement—which is distinguishable from a failure to register—is not separately punishable for each day. Accordingly, even if a mistaken claim of privilege to a single question were deemed a failure to file the statement, it could be punished by not more than five years imprisonment and a \$10,000 fine.

vant inquiry is only whether the Act—with which petitioners have been directed to comply by the Board's orders—requires petitioners to make any admission which could be self-incriminatory. If neither the bare act of registration nor the submission of the statement can incriminate a registrant in any conceivable manner, it follows that the claim that these orders infringe Fifth Amendment rights must be rejected.

1. *Registration*.—At the outset, we believe it important to note a critical distinction between the registration scheme established by the Subversive Activities Control Act and registration provisions of other statutes which have been subjected to constitutional challenge. *United States v. Kahriger*, 345 U.S. 22, and *Russell v. United States*, 306 F. 2d 402 (C.A. 9), concerned statutes which defined a class of persons required to register, and it was asserted there—as here—that compulsory registration by such individuals would require them to make disclosures which could be used against them in criminal proceedings. In both *Kahriger* and *Russell*, however—unlike this case—criminal penalties were prescribed for those who failed to come forward and register voluntarily. In other words, members of the class subject to the registration requirement were put to the assertedly unconstitutional choice (held impermissible in *Russell*) of making a self-injurious disclosure or risking criminal punishment for their silence.*

* In *Kahriger*, a majority of the Court held that the disclosure was not the sort protected by the Fifth Amendment because it dealt with future, and not past, acts. 345 U.S. at 32.

The Subversive Activities Control Act authorizes no such "squeezing device." *United States v. Kah-riger*, 345 U.S. 22, 36 (Black, J., dissenting). An individual who does not volunteer to register is not required to make any disclosure whatever, nor can he be punished for merely having failed to come forward. The sole remedy provided by the Act is a proceeding before the Board to compel the individual to register, and in that proceeding the burden of proving membership in the statutory class is on the Attorney General. Criminal penalties for failing to register are authorized only with respect to those who have been found, by a preponderance of the evidence, to be members of the class, and these penalties cannot come into play until after the findings have been sustained by the courts to which review is sought. Hence, registration cannot be used as a means of coercing persons who have concealed their membership in Communist-action groups to come forward—under threat of criminal punishment—and make self-damaging disclosures. Only those whose membership the Attorney General can prove in Board proceedings (and on judicial review) can be compelled to register against their will.¹⁰

¹⁰ The same cannot be said of the statutes involved in *Kah-riger* and *Russell*. It is true that no individual may be successfully prosecuted under those statutes unless the Attorney General possesses information establishing his membership in the class. But the danger of criminal prosecution may induce otherwise unwilling members of the class to come forward and register. Under the instant Act, however, there is no danger of immediate criminal prosecution; the reluctant member may therefore want to see what the Attorney General can prove in the Board proceeding.

In these circumstances, it cannot be claimed, we believe, that compelled registration amounts to coerced self-incrimination. The individual who, like petitioners here, has been found on evidence presented by the Attorney General to be a member of a Communist-action group is making no "injurious disclosure" (*Hoffman v. United States*, 341 U.S. 479, 487) when he registers, pursuant to a court-affirmed Board order, as a member of a Communist-action group. First of all, the bare act of registration in compliance with a Board order based on a finding of membership is not an admission of any kind and could not be used against the registrant in any way. Second, Section 4(f) of the Act manifests Congress' intention that the act of registration not be considered an admission by the registrant for the purpose of any criminal prosecution. And finally, in light of the antecedent finding of membership on which a registration order must be based, it is impossible for the mere act of registration to provide any "leads" from which the government could derive incriminatory evidence.

a. The entire statutory scheme is inconsistent with the notion that compulsory registration "as a member" of a Communist-action group may serve as an admission of membership. Apart from Section 4(f), which we discuss below (pp. 24-26, *infra*), it would be quite extraordinary to suppose that Congress intended to pry damaging admissions from unwilling members of Communist-action groups by creating a procedure whereby the very fact which these individuals are to be coerced into admitting (*i.e.*, membership) must first

be established before the Board by a preponderance of evidence *aliunde* any such admission.

The sole purpose of registration, we submit, is to place the name of the registrant on the public list which the Attorney General is required to keep, pursuant to Section 9(a) of the Act. Since the Act was designed around a voluntary registration system with which, it was contemplated, the affected organizations and their members would comply, it was consistent with its basic structure to provide for the personal registration of unwilling as well as willing individuals. With respect to the latter Congress could, of course, have achieved the same result by empowering the Board to register all those found by it to be members of non-complying Communist-action organizations, and such a course would clearly have avoided the self-incrimination claim made here. But since, as we contend, the act of registration is no more incriminatory if done by the individual than if done by the Board itself, petitioners cannot assert the constitutional claim as a bar to enforcement of the Board's orders directing them to engage in the act themselves.

Involuntary registration "as a member" of a Communist-action group imports no actual admission of membership; it is nothing more than compliance with an administrative order directing registration. If, for example, the statute authorized the Board to take, for a public record, the fingerprints of any individual found to be a member of a Communist-action organization, submission to fingerprinting could not be deemed privileged under the Fifth Amendment. The act of signing one's name to a registration form is, we submit, materially indistinguishable.

Indeed, the statute prescribes no particular registration form. While it does specify that registration be "as a member" of the Communist-action organization, it might well be sufficient for someone in petitioners' position to comply by signing his name to an acknowledgment that he is registering "pursuant to the order of the Subversive Activities Control Board" in his case.¹¹ Since it is not the purpose of the Act to coerce confessions from members of Communist-action organizations,¹² it makes no difference to those charged with its administration whether the particular language used by persons compelled to register is or is not framed in terms of an admission. And, in any event, an individual who signs Form IS-52a (Pet. Br. 65) is not, on the face of that document, necessarily admitting that he is a member of a Communist-action organization; he is merely signing his name, under compulsion (which he may indicate on the form itself), as one who has been found to be a member. His signature adds nothing of an incriminatory nature to the underlying Board finding.

¹¹ The Attorney General's present form calls for a signature and the registrant's address. The latter item may, of course, be incriminatory under certain circumstances (see *Simpson v. United States*, 355 U.S. 7), but whether the privilege may be appropriately claimed here should not be decided until petitioners invoke it on the registration form.

¹² We have no quarrel with the series of decisions involving National Labor Relations Board orders providing for compulsory posting of notices which assertedly compelled respondents to confess to violations of law. See Pet. Br. 39; cf., *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 438-439. Congress did not intend here—any more than it did in those cases—to authorize an administrative agency to extort confessions of wrongdoing.

Moreover, if there were any possibility that the registration form could be so construed as to be used against petitioner as an admission in a criminal proceeding, the well established constitutional rule barring the admission of involuntary confessions would prevent its being utilized in that manner. Those who are compelled by a Board order—enforceable with severe criminal sanctions—to sign a particular registration form can obviously not be said to have admitted voluntarily the truth of what the form contains.¹²

b. It is entirely clear from Section 4(f) of the Act that Congress was not intending to have compulsory registration serve as an admission of any incriminating fact. Section 4(f) provides:

Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under Section 7 or Section 8 of this title as an officer or member of

¹² Petitioners also maintain that registration amounts to an admission by them that the Communist Party is a Communist-action organization (Pet. Br. 23, 32). It is true that Form IS-52a may be subject to that construction, but nothing in the statute forbids petitioners from inserting qualifying language or otherwise amending the form so as to avoid any danger of self-incrimination. Moreover, since the question whether the organization to which the registrant belongs is a Communist-action organization is not even in issue in this proceeding, his registration on Form IS-52a would not, in our view, be such an admission.

any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute. [Emphasis added.]

We do not contend that this is an immunity provision which "supplant[s] the privilege" within the meaning of *Counselman v. Hitchcock*, 142 U.S. 547, 585. But we do believe that it expresses an unequivocal legislative judgment not to permit the bare act of compelled registration to be used against the registrant in the only fashion in which it could meaningfully hurt him."

Petitioners argue that Section 4(f) does not reach use of "the fact of * * * registration" in a criminal prosecution under Section 15(c) of the Act for violation of Sections 5 and 10 (Pet. Br. 30-32). But this claim is squarely rebutted by the statutory language—which covers its use in "any prosecution * * * for any alleged violation of any other criminal statute." This Court noted in *Scales v. United States*, 367 U.S. 203, 211-212, that Section 4(f) was "the product of the fusion of provisions contained in measures conceived by the House and the Senate * * *" and that the basic structure of Section 4 was "the result of the Senate's efforts." Relying principally on the history of the House provisions and the alleged omission of

* Voluntary registration may, of course, be an "investigatory lead" from which other evidence may be derived. See *Scales v. United States*, 367 U.S. 203, 211, and n. 6, 217. Compulsory registration is based on a finding of membership, so that registration can obviously produce no new leads. See pp. 26-27. *infra*.

several of them from the Act's final version, petitioners maintain that Congress intentionally left areas in which the "fact of registration" could be used in the criminal prosecution of a registrant (Pet. Br. 69-71). But the history of Section 4 outlined in the *Scales* opinion (367 U.S. at 211-217) demonstrates that the Senate version of that Section—which was the basic framework of the enacted provision—provided no immunity with respect to the "fact of registration" other than for subsections (a) and (c) of Section 4. In conference, the words "or for any alleged violation of any other criminal statute" were added to the Senate version, and the most reasonable interpretation of this addition, we believe, is that it was intended to bring under Section 4(f) all the separate immunity clauses regarding "fact of the registration" contained in the House legislation. The fact that the House conferees did not even advert to any change from the House version in their report on the conference bill indicates that they believed that the substance of the House provisions had been incorporated by the additional language in Section 4(f). See H. Rep. No. 3112, 81st Cong., 2d Sess. (1950).

c. Nor is it conceivable that compulsory registration—even if taken as a declaration by the registrant that he is a member of the Communist-action organization—could provide any investigatory leads to other incriminatory evidence. The Board may order registration only if it has found, by a preponderance of the evidence, that the respondent before it is a member of a non-complying Communist-action organization.

If it has sufficient evidence to support that finding, it cannot possibly be assisted in any further investigation by the registrant's compelled stark admission of membership. Indeed, under these circumstances the statement to which the registrant subscribes presents not only no "real danger" of further incrimination; the hazard is so remote as not even to approach the "mere imaginary possibility" of increased danger of prosecution—which has been held to be insufficient to sustain a claim of privilege. See *Rogers v. United States*, 340 U.S. 367, 374-375, quoting from *Heike v. United States*, 227 U.S. 131, 144, and *Mason v. United States*, 244 U.S. 362, 366.

2. *Submission of a statement.*—The question whether petitioners are protected by the Fifth Amendment self-incrimination privilege against being required to complete and submit the statement which Section 8(c) prescribes is squarely controlled, we believe, by *United States v. Sullivan*, 274 U.S. 259. That case concerned a taxpayer who refused, on self-incrimination grounds, to file an income tax return. In reinstating his conviction for failure to file (which had been reversed by the court of appeals) this Court, speaking unanimously through Mr. Justice Holmes, said (274 U.S. at 263-264):

If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. * * * It would be an extreme if not an extravagant application of the Fifth Amendment to say that it author-

ized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.

The statute, as incorporated in the Board's orders here under review, requires petitioner to submit a registration statement "to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe." Section 8(c). The prescribed form is IS-52 (Pet. Br. 66-68), and petitioners may—just as the defendant could in the *Sullivan* case—test any particular question "in the return" by asserting the privilege against self-incrimination in response to that question. At the present juncture, however, only the duty to submit the return is at issue (pp. 12-18, *supra*), and that duty is not in conflict with any constitutional principle.

In summary, petitioners' self-incrimination claim amounts to the argument that compelling them to sign their names or to file responses to a questionnaire which includes incriminatory questions violates their Fifth Amendment rights. In light of the fact that the declaration which they are required to sign is neither intended to be nor can be incriminatory, and is not an admission of any kind, they may constitutionally be compelled to sign. In this respect, their "registra-

tion" is no different from the various nontestimonial acts which a criminal defendant may be compelled to perform such as speaking or writing for identification, undergoing a physical examination, being fingerprinted or photographed or trying on an item of clothing which is in evidence. See, *e.g.*, *Holt v. United States*, 218 U.S. 245, 252-253; 8 Wigmore, *Evidence* § 2265 (McNaughton Revis. 1961). The registration statement, in other words, is not a meaningful "testimonial disclosure." As a declaration, it does nothing more than identify the registrant as the same man found by the Board to be a member of a Communist-action group. That identifying effect is not within the range of Fifth Amendment protection, particularly not when—as here—identity was admitted in the course of the Board proceedings.

In sum, with respect to self-incrimination, the Act prescribes no more in its present form than if Congress had chosen (1) to allow the Attorney General to "register" all those found by the Board to be members of Communist-action groups and (2) to authorize the Attorney General to interrogate such individuals in person and make their answers public. No self-incrimination objection could be made to either course (except to specific questions asked during an interrogation), and the effect is identical under the presently authorized procedure. Petitioners' own registration is, for any evidentiary purpose, indistinguishable from registration of their names by the Attorney General or the Board or any other government agent. And the obligation to submit a statement is no differ-

ent from a compulsion to appear personally and testify.

II

COMPULSORY REGISTRATION IS A REASONABLE MEANS OF EFFECTUATING THE LEGISLATIVE OBJECTIVE OF PUBLIC DISCLOSURE

Conceding, *arguendo*, that Congress could constitutionally require a Communist-action organization to register and disclose its membership list and that it could also empower an administrative agency to determine and disclose the identity of members if the organization refused to comply with an order that it do so, petitioners argue (Pet. Br. 33-35) that the self-registration aspects of the orders now under review serve no disclosure function and are, therefore, constitutionally invalid. This contention challenges Congress' choice of the means whereby to effectuate public disclosure; it rests on the notion that rather than making personal registration the only condition of inclusion in the Attorney General's public register, Congress should have authorized the Attorney General or the Board to add to that register the name of anyone who is found by the Board to be a member of a Communist-action organization.¹⁵ Since, as we

¹⁵ We do not understand petitioners to be arguing that anything beyond a public Board finding is superfluous. There could hardly be any doubt that there is a purpose in centralizing the roster of those who have officially admitted that they are or have been officially declared to be members of Communist-action groups.

have shown, petitioners are not hurt by the registration requirement and are obliged to make no admissions whatever, they are in no position to complain about Congress' choice of methods. In *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 96-97, this Court commented on a closely related issue: "[T]he legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods."

In any event, the suggestion that there is "no governmental purpose" to support the self-registration requirement overlooks several considerations. First, Congress wished to place the major burden of disclosure on the Communist-action organizations themselves and, in case of their noncompliance, on their members. For that reason it chose to make registration the "core of the Internal Security Act" (*Scales v. United States*, 367 U.S. 203, 210), and assigned to the Subversive Activities Control Board only the duty of determining whether organizations which failed to register were obliged to do so and whether individuals alleged by the Attorney General to be members were members in fact. The Act contemplated that ultimately, if not immediately, disclosure would result from registration by the organizations or their members without any need for preliminary Board proceedings. This kind of compliance could be achieved only if those whose registration was compelled by the Board were treated no differently than those who

registered voluntarily. If the former could avoid any personal involvement by simply ignoring the Board proceedings, they would obviously not be encouraged to register. If, on the other hand, a nonregistering member is obliged—as he is under the present procedure—to do after a Board proceeding exactly what he should have done initially on his own, others in his position may find it worthwhile to avoid the inconvenience of a Board investigation and register before the Attorney General requests that he be ordered to do so.

Second, the registration procedure is a means of obtaining from the registrant responses to the inquiries on the registration statement. Congress reasonably felt that it was not enough to publish only the names of those who are members of non-complying Communist-action organizations; it authorized the Attorney General to make further inquiries on a registration statement and to make the responses to these inquiries available to the public. The Board's disclosure of its findings cannot result in public knowledge of these additional facts (which a registrant may provide or which he may claim to be privileged as self-incriminatory). It is, of course, true that the act of "registration" *per se* is not justified by the need for this further inquiry. But it was not unreasonable for Congress to attach a registration obligation—which, as we have shown (p. 29, *supra*) is merely identifying—to the obligation to file the statement. Since, in any event, it is necessary that the individual found to have been a member make himself personally available to complete the state-

ment, the registration requirement is hardly a severe "exaction" (Pet. Br. 34).

Finally, personal registration has the virtue of keeping the records current. While Congress might have achieved the same immediate disclosure effect by empowering the Attorney General to compile a list or register of those found to be members of Communist-action organizations by the Board, a list drawn on this basis might rapidly become obsolete because of deaths or changes of address. Under a personal registration procedure, on the other hand, the Attorney General may require notification of any change of address or may compel re-registration at regular intervals. And the fact that the privilege against self-incrimination might be claimed with regard to a registrant's address (see note 11, *supra*) does not mean that such a privilege is always available or that it is invariably asserted. Congress could reasonably have assumed that the advantages of having a current list justified the personal registration requirement—even if some registrants might successfully invoke a privilege with regard to their addresses.¹⁶

¹⁶ Petitioners' claim (Pet. Br. 35) that the registration requirement may compel individuals who are not members at the time of registration falsely to state that they are is entirely speculative. The evidence in these cases established that petitioners were highly placed members of the Communist Party. Although we have suggested that petitioner Albertson's case may be moot, petitioner has resisted the suggestion partially on the ground that he has an internal appeal available from the order expelling him. Memorandum for Petitioners, p. 11. Impliedly, therefore, Albertson contends that his status has not changed.

III

THE ACT'S MEMBER REGISTRATION PROVISIONS DO NOT
ABRIDGE PETITIONERS' FIRST AMENDMENT LIBERTIES

Petitioners assert two First Amendment objections to the Board orders directing them to register. They claim first that the act of registration amounts to an "affirmation" or "acceptance" of political ideas, and that it is, therefore, the sort of conduct which government may not constitutionally compel (Pet. Br. 37-39). They also contend that registration and public disclosure tend to discourage membership in the Communist Party even on the part of those whose activity is limited to peaceful political advocacy, and that the Act therefore cuts more deeply than necessary into freedom of association (Pet. Br. 39-41). Neither argument is substantial.

A. THE ACT OF REGISTRATION IS NOT A COMPULSORY DECLARATION
OF POLITICAL BELIEF

Petitioners' first challenge rests on the premise that by signing the registration form they are affirming or otherwise declaring a prescribed belief in certain political ideas. Petitioners analogize the act of registration to the compulsory declaration of belief held constitutionally impermissible in the "Flag-Salute" cases (*Board of Education v. Barnette*, 319 U.S. 624) and to the confessions of wrongdoing required by early orders of the National Labor Relations Board. The statute involved here, however, does not require members of Communist-action groups to sign forms in which they forswear the goals or means of the organizations with which they are associated. If such

a declaration were compelled, the analogy to the flag-salute cases might be persuasive. The provisions involved here are distinguishable from required affirmations of belief in at least three important respects:

First, the form is patently not a declaration of belief of any sort—whether government-supported or government-condemned. It merely reflects an objective fact—membership in a particular organization—which may legitimately be the subject of inquiry by governmental organizations.

Second, unlike the flag-salute or the oath involved in *Torcaso v. Watkins*, 367 U.S. 488, the registration form does not compel affirmation of one doctrine (which may be government-supported) rather than another. The registration requirement applies only to those who have been found to be members of Communist-action organizations, and to the extent that they affirm anything, they do so consistently with what has been found to be their associations. They are not, in other words, compelled to make declarations which they consider false or affirmations inconsistent with their beliefs.¹⁷

Third, the form is not, in our view, a meaningful declaration at all. As we demonstrate above in response to petitioners' self-incrimination claim (pp. 21–24, *supra*), registration under compulsion of a Board order is not to be considered an admission of member-

¹⁷ Petitioners' contention that those who disagree with the Board findings are nonetheless required to certify them as true (Pet. Br. 38) is baseless. A registrant may indicate on the form that he disagrees with or does not accept the Board's findings.

ship or an adoption of the Board's findings. It is merely the formal condition precedent for inclusion in the Attorney General's public register. In this regard, therefore, the present case is distinguishable from the Labor Board orders directing respondents before the Board to confess that they had committed unfair labor practices.

Petitioners' challenge in this regard is really an indirect assertion of the same First Amendment claim made and rejected in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 88-105. If petitioners were asked squarely whether or not they are members of the Communist Party, they might assert a privilege against self-incrimination but would not be heard to claim that a response to the question would be a "declaration of political belief" which could not be compelled consistently with the First Amendment. The registration requirement achieves much the same result as a direct inquiry and, since it follows a finding of membership and may not be used in an incriminatory manner, it is not subject to Fifth Amendment challenges. It is not rendered invalid under the First Amendment merely because it requires petitioners to make a declaration.

B. REGISTRATION AND PUBLIC DISCLOSURE OF ALL MEMBERS OF COMMUNIST-ACTION GROUP IS JUSTIFIED BY THE IMPORTANCE OF REMOVING THE "MASK OF ANONYMITY" OF SUCH GROUPS

Petitioners' alternative First Amendment claim has also been resolved by this Court's decision in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1. The Court there held that notwithstanding

ing "the public opprobrium and obloquy which may attach to an individual listed with the Attorney General as a member of a Communist-action organization" (367 U.S. at 102), it was constitutionally permissible for Congress to require the organization to make public its membership list because of the particular danger presented by "*foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country" (367 U.S. at 104, emphasis in the original).¹⁸ In other words, the Court held that the danger warranted full disclosure of all members, no matter how innocent an individual member might be and how this might affect future association—for legitimate purposes—with such an organization. If the organization may, consistently with the First Amendment, be compelled to produce a list of all its members, it necessarily follows that there is no First Amendment restriction on similar compulsory public disclosure by the members themselves. Association with the organization for lawful purposes will not be more greatly discouraged by self-registration than by the organization's publication of its membership list.

The argument that only those whose participation in Communist Party activities is sufficient to sustain a Smith Act conviction should be required to register

¹⁸ The Court relied on other registration or reporting decisions such as *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63; *Burroughs v. United States*, 290 U.S. 534; *United States v. Harriss*, 347 U.S. 612.

(which petitioners impliedly make) misses the point. This Court observed in the *Communist Party* case that the Act was regulatory in nature rather than prohibitory. 367 U.S. at 56. The standard for requiring the regulatory disclosure which the Act prescribes need not, therefore, be the same as the standard governing criminal prosecutions. That an individual required to register may not have engaged in the kind of conduct made criminal by the Smith Act or by the Subversive Activities Control Act does not make registration impermissible. Congress could reasonably conclude that, for disclosure purposes, all members should be encompassed by the statutory classification, since some risk of severe harm is involved whenever any member remains anonymous and the burden of disclosure is not severe. The present statute differs, as this Court noted in the *Communist Party* case, from other membership disclosure or registration situations "in the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests." 367 U.S. at 93. These considerations justify Congress' decision to draw the line so as to cover all members, not merely those who join in the organization's illegal means and objectives. See *North American Co. v. Securities and Exchange Commission*, 327 U.S. 686, 710-711.

IV

PETITIONERS WERE NOT DENIED FIFTH AMENDMENT RIGHTS BY THE BOARD'S RELIANCE ON ITS PRIOR DETERMINATION OF THE STATUS OF THE COMMUNIST PARTY

Petitioners argue that they were constitutionally entitled to contest in this proceeding the proposition that the Communist Party was a Communist-action organization (Pet. Br. 42-51). This was a factual issue, they contend, as to which the Board had made its initial finding in 1953, and that finding could not, under the Due Process Clause of the Fifth Amendment, bind individual members ten years after it had been made. The same claim was rejected by the court of appeals in this case (R. 73), in *National Council of American-Soviet Friendship, Inc. v. Subversive Activities Control Board*, 322 F. 2d 375, 392 (C.A.D.C.), in *Jefferson School of Social Science v. Subversive Activities Control Board*, 331 F. 2d 76, 82 (C.A.D.C.) and in *Weinstock v. Subversive Activities Control Board*, 331 F. 2d 75, 76 (C.A. D.C.).

"[D]ue process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." *Moyer v. Peabody*, 212 U.S. 78, 84. The Subversive Activities Control Act establishes specific procedures for determining which organizations fall within the class of those required to register. These procedures include full adversary hearings before an expert administrative tribunal and judicial

review of its determinations. The Communist Party was found, pursuant to these procedures, to be a Communist-action organization. Under the Act, the Party was thereupon required to register and disclose its membership. If it failed to do so, its members were to come forward and register personally. The personal obligation of the members is derivative; the Act requires them to register only if they belong to an organization which has failed to comply with a registration order.

Congress was surely justified in adopting this multi-stage registration scheme and was not constitutionally required to afford each individual member the opportunity to relitigate the question whether the organization to which he belongs is a Communist-action organization. The tortuous history of the *Communist Party* case (367 U.S. at 19-22) demonstrates the total impracticality of permitting such a course in each registration proceeding. Moreover, the Act's failure to provide for relitigation of the organization's status may be considered a statutory presumption that an organization which is once ordered to register retains the same character until such time as it produces evidence before the Board demonstrating that its nature has changed. As this Court observed in the *Communist Party* case (367 U.S. at 69): "Where the current character of an organization and the nature of its connections with others is at issue, of course past conduct is pertinent. Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within

which the implications of present conduct may be known." So long as the Communist Party has not sought to present evidence to the Board to show that it is no longer a Communist-action organization, the Board's judgment based on conduct prior to 1953 may be presumed to be of continued validity.

It is no answer to say that the Communist Party has been unable to relitigate its status because Section 13(b) of the Act allows only registered organizations to apply to the Attorney General and then to the Board for cancellation of registration and redetermination of status. The Party chose not to register and it cannot thereby benefit its members and entitle them to *de novo* considerations of the Party's status. And, in any event, procedures other than Section 13(b) might be used by the Party to bring such new evidence as it has before the Board or to have a court direct the Board to consider such changed circumstances as may exist. The Party has never made any such attempt, and in its absence the Board could constitutionally adhere to its earlier determination.¹⁹

The rule that no relitigation is permissible does not lend substance to petitioners' additional claim that the individual registration provision of the Act amounts to a bill of attainder (Pet. Br. 36, 46-47).

¹⁹ The various commentators quoted at pp. 48-51 of petitioners' brief express a point of view which is not inconsistent with the Board's finding that the Communist Party is a Communist-action organization. In any event, they are merely personal views on which the Board might pass if they were properly presented at an appropriate hearing. Standing alone, they surely do not justify a current finding that the Board's 1953 determination is obsolete.

Unlike the statute in *United States v. Brown*, 381 U.S. 437, the Subversive Activities Control Act does not designate "members of the Communist Party" as persons subject to its sanctions. 381 U.S. at 450. Instead, the Act involved here "set[s] forth a generally applicable" (*ibid.*) standard in its definition of a Communist-action organization, and it leaves to an administrative agency—to whom Congress has assigned quasi-judicial functions—the task of determining which organizations "possess the specified characteristics" (*ibid.*). The fact that the agency, in an early stage of the registration process, determined that the Communist Party had the required characteristics did not make the Act a bill of attainder. What the Bill of Attainder Clause prohibits is "legislative punishment" (381 U.S. at 447), not a sanction which an administrative agency imposes pursuant to a generally phrased legislative direction. If the Board's action is considered part of the legislative course for purposes of determining whether the Act is a bill of attainder, as petitioners suggest, a Board order directed to a specified individual would be *ipso facto* invalid on that ground. Obviously, therefore, the critical test is whether the statute—not an earlier order of the Board—so specifically defines the class as to run afoul of the Bill of Attainder clause. This Court expressly held in the *Communist Party* case that the Subversive Activities Control Act did not do so. 367 U.S. at 84-87.

THE FACT THAT PETITIONERS WILL NOT BE ENTITLED TO A JURY TRIAL ON THE QUESTIONS WHETHER THEIR ORGANIZATION IS A "COMMUNIST-ACTION" ORGANIZATION AND WHETHER THEY ARE MEMBERS DOES NOT INVALIDATE THE ORDERS REQUIRING THEM TO REGISTER

Petitioners' final contention is that the Act is unconstitutional because it does not afford them a trial by jury—in case they disobey the Board's orders—on the factual issues whether the Communist Party is a Communist-action organization and whether they are members. This contention is both premature and unsound.

A. ISSUES RELATING TO THE PROPER PROCEDURES AT PETITIONERS' CRIMINAL TRIAL FOR DISOBEDIENCE OF BOARD ORDERS ARE NOT RIPE FOR DECISION AT THIS JUNCTURE.

This case presently involves two orders of an administrative agency directing petitioners to register, and the orders are based upon findings of that agency. Petitioners may be penalized for violation of these orders only after the findings and the lawfulness of the orders are considered and approved by reviewing courts. Before being subjected to any criminal penalty, petitioners are entitled to a full judicial criminal trial. Whether the issues presented for jury determination in that criminal trial are unconstitutionally circumscribed is a question which must be resolved in that proceeding—if it ever takes place. The court of appeals, therefore, properly rejected this argument as premature (R. 69-70, n. 6).

B. PETITIONERS ARE NOT ENTITLED TO RE-SUBMIT TO THE JURY IN THEIR CRIMINAL TRIAL THE UNDERLYING FACTUAL FINDINGS OF THE BOARD

Petitioners' contention that they are entitled to a full criminal trial on the issues of the Party's status and their membership is inconsistent with basic principles of administrative law. Since the Board's orders to register are not criminal penalties, they can be entered pursuant to an administrative hearing. When and if petitioners refuse to obey the orders without legal justification, they may be tried criminally. It will then be irrelevant whether some error was committed in originally issuing the orders; it will be enough that petitioners have failed to obey final orders. On this issue, petitioners will of course have the full protection of the Fifth and Sixth Amendments. But they will not be able to relitigate the validity of the orders any more than can a person who violates an order of the Federal Trade Commission or of the Interstate Commerce Commission.

The law is replete with instances in which a status or duty is established administratively and is enforced by criminal penalties in case of disobedience. Contrary to petitioners' suggestion (Pet. Br. 54), agencies like the Federal Trade Commission and National Labor Relations Board make "administrative adjudications of the acts of individuals" (not merely "administrative rule-making") upon which they enter orders directing parties before them to engage in or desist from certain conduct. The agencies' findings are reviewed judicially and, if they are lawful and

supported by evidence, the orders are enforced. In case of any disobedience thereafter, the parties subject to the orders may not relitigate their validity; the only questions open at that stage are whether they had notice of the orders and whether they disobeyed them. As this Court said in response to a similar claim made in *Cox v. United States*, 332 U.S. 442, 453, with respect to an order of a Selective Service Board (which is not judicially reviewable before compliance is required see note 7, *supra*): "The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order." See, also, *Yakus v. United States*, 321 U.S. 414, 444.

The procedure established by the Subversive Activities Control Act is particularly immune from attack of the sort made here by petitioners because it provides for full judicial review of the underlying order before compliance is required. Hence, a person subject to such an order is not put in the position described by Mr. Justice Lamar in *Wadley Southern Ry. Co. v. Georgia*, 235 U.S. 651, 662: "He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order." Petitioners will know whether the Board's orders are void or valid before being required to perform the acts which, if not performed, will subject them to criminal penalties.

This element also distinguishes the present case from the dissenting views in *United States v. Spector*, 343 U.S. 169, on which petitioners rely heavily (Pet. Br. 52-55). Justices Jackson and Frankfurter expressed uncertainty in that case as to whether judicial review of the determination of deportability was available before the alien subject to the deportation order was obliged to comply. 343 U.S. at 178-179. Moreover, although Justice Jackson did speak, at one point in his opinion, of "avoid[ing] jury trial" (343 U.S. at 177), he observed afterward that the deportation finding had not been "made either by a jury trial or a court decision" (343 U.S. at 178, emphasis added). In the present case, the determination that petitioners must register will have been reviewed by a court before petitioners are called upon to comply with the orders.

It is, of course, true that the cases involving enforcement of orders of administrative agencies usually involve contempt, and contempt cases are not, strictly speaking, criminal prosecutions. But a contempt defendant is as much entitled to a fair judicial trial of all relevant issues as any criminal defendant. In addition, it would be anomalous if the Constitution required the relitigation of the Board's determination in a criminal prosecution based on such a determination, but not if the statute had provided for judicial enforcement of the Board's order. It could hardly make any constitutional difference whether Congress had decided to authorize the court of appeals to enforce the Board's determination

(based on the same preponderance-of-the-evidence standard of review) by ordering individual members to register or merely to "affirm" that determination. The fact that Congress has given the members the benefit of a full criminal trial (including the guarantees of indictment and trial by jury) when charged with failure to obey the Board's final orders should not produce, as a constitutionally required result, the right to relitigate the administrative determination itself.

If a defendant could collaterally relitigate the correctness of an administrative order, the result would be to interfere seriously with Congress' power to delegate authority to an administrative agency. Any person could flout the administrative determination knowing that the order could be relitigated. The only risk would be that the relitigation would result in the same determination as the agency had previously made, thereby subjecting the defendant to criminal penalties. Thus, the determination would serve only as notice to the public of the facts found and to the members that they faced a criminal trial if they did or failed to do certain things. Since all issues of enforcement would be determined by the courts *de novo*, effective regulatory power would be transferred from the administrative agency, where Congress placed it, to the courts.²⁰

²⁰ *Wong Wing v. United States*, 163 U.S. 228, on which petitioner relies, is clearly inapposite. There, this Court held unconstitutional, under the Fifth and Sixth Amendments, a statute providing for trial by a justice, judge, or commissioner of Chinese aliens for being unlawfully in the United States. Thus, the case was never to reach a court.

In sum, we submit that an individual may challenge a Board order only in the manner Congress has provided—that is, by applying for review in the court of appeals and ultimately in this Court. The defendant in a criminal prosecution, however, can litigate only the question whether he has obeyed the order. He has no right to a *de novo* judicial review of the order itself.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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APPENDIX A

The Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781 *et seq.*, provides in part as follows:

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of

a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

SEC. 3. For the purposes of this title—

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

SEC. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(c) The registration required by subsection (a) or (b) shall be made—

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(4) In the case of a Communist-action organization, the name and last known address of each individual who was a member

of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

SEC. 8. (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title

is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(i) If after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8,

as may be appropriate; and send a copy of such order to such individual.

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this Title—

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register

under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

The Attorney General's applicable regulations provide:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 11—REGISTRATION OF COMMUNIST ORGANIZATIONS AND MEMBERS THEREOF

Order No. 250-61

Administration of Certain Sections of the Subversive Activities Control Act of 1950

DEFINITIONS OF TERMS

Sec.

11.1 Definitions of terms.

GENERAL REQUIREMENTS

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- 11.101 Computation of time.
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REQUIREMENTS AS TO REGISTRATION

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- 11.204 Maintenance of books and records.
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- 11.206 Form for registration of individuals.
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REGISTERS

Sec.

11.300 Public inspection of registers.

LABELING

11.400 Labeling of publications.

Pursuant to the authority vested in me by sections 7, 8, 9, and 10 of the Subversive Activities Control Act of 1950 (64 Stat. 993-996; 50 U.S.C. 786-789) and by section 161 of the Revised Statutes of the United States (5 U.S.C. 22), I hereby prescribe the following regulations to carry out the provisions of said sections of the Subversive Activities Control Act of 1950:

DEFINITIONS OF TERMS

Section 11.1. *Definition of terms.* As used in these regulations:

(a) The term "Attorney General" means the Attorney General of the United States.

(b) The term "act" means the Subversive Activities Control Act of 1950.

(c) The term "section" refers to a section of the act.

(d) The term "regulations" refers to all regulations, forms, and instructions to forms prescribed by the Attorney General pursuant to the act.

(e) The term "registrant" means an individual or organization registered under the act.

(f) The term "executive officer" means the individual who directs the course of business of the organization or who outlines the duties and directs the work of subordinate employees and who is responsible for the day-to-day operation of the organization's affairs and for carrying into effect the purposes of his employment.

(g) The term "moneys received" shall include, but shall not be necessarily limited to, all moneys and other things of value received by the registrant from rents, sales, bazaars, benefits, socials, parties, entertainments, gifts, donations, contributions, subscriptions, subsidies, legacies, grants, or funds held in trust for the benefit of the registrant.

(h) The term "moneys expended" shall include, but shall not be necessarily limited to, all moneys and other things of value which a registrant expends by way of purchase, barter, gift, donation, subscription, transfer, conveyance, lease, subsidy, assignment, endowment, or release.

GENERAL REQUIREMENTS

Section 11.100 *Administration of the act assigned to Internal Security Division.*

The administration of sections 7 to 10, inclusive, of the Subversive Activities Control Act of 1950 is assigned to the Internal Security Division, Department of Justice. All communications with respect thereto should be addressed to the Assistant Attorney General, Internal Security Division, Department of Justice, Washington 25, D.C.

Section 11.101 *Computation of time.*

Sundays and holidays shall be counted in computing any period of time provided for in the act or in the regulations.

Section 11.102 *Act and regulations to be considered together.*

In determining any question concerning the application of the act to any person the regulations shall be considered together with the provisions of the act. The regulations shall not be construed to limit the act or to define its full scope or application.

REQUIREMENTS AS TO REGISTRATION

Section 11.200 *Forms for registration of organizations.*

Each Communist-action organization and each Communist-front organization which is required to register with the Attorney General shall accomplish such registration on a form hereby designated as Form IS-51a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D.C. Forms may be obtained in person or by mail.

Section 11.201 *Form for registration statement of organization.*

Registration statements of organizations shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D.C. Filing may be made in person or by mail and shall be deemed to have taken place on the receipt thereof. Such registration statement shall be on a form hereby designated as Form IS-51, copies of which are available at the Internal Security Division.

Section 11.202 *Annual Reports.*

The annual report required by section 7(e) of the act shall be submitted on a form hereby designated as Form IS-53. This form is available on request at the Internal Security Division, Department of Justice, Washington 25, D.C., and may be obtained in person or by mail.

Section 11.203 *Accounting of moneys received and expended.*

The accounting of moneys received and expended as required to be reported by section 7(d)(3) of the act shall be accomplished in the manner prescribed by Form IS-51.

Section 11.204 Maintenance of books and records.

(a) Each organization registered under the act shall make and keep current all bookkeeping and other financial records relating to registrant's activities, including cancelled checks, bank statements, and records of income and disbursements, showing names and addresses of all persons who have paid moneys to the registrant or who have received moneys from the registrant, the specific amounts so paid or received, the date on which each item was paid or received, and the purpose for which any item was expended.

(b) Each Communist action organization in addition to keeping the books and records required by subsection (a) of this section shall make and keep current such books and records as will disclose the names and addresses of the members of the registrant, the officers and employees of the registrant, and the names and addresses of persons, other than members, officers, or employees, who actively participate in the activities of the registrant.

Section 11.205 Duty of officers.

In the event an organization required to register or file a registration statement or annual report pursuant to section 7 of the act has failed to submit its registration form, registration statement, or annual report to the Attorney General for filing within the time specified by section 7 of the act, it shall be the duty of the following-designated officers of such organization to execute and file, or cause to be executed and filed, the required registration form, registration statement, or annual report, as the case

may be, within ten days after the failure of the organization to do so:

(a) The president, chairman, or other person who is the chief officer of the organization.

(b) The vice-presidents, vice-chairmen, or the persons performing functions similar to the functions of such officers.

(c) The national organizational secretary.

(d) The executive officer or executive director.

(e) The national executive secretary, national secretary or persons performing functions similar to the functions of such officers.

(f) The treasurer, or person performing functions similar to the functions of such officer.

(g) The members of the national board, or board of directors, or other similar governing body of the organization.

Section 11.206 *Form for registration of individuals.*

Each individual required to register pursuant to section 8 (a) or (b) of the act shall accomplish such registration on a form hereby designated as Form IS-52a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D.C., and may be obtained in person or by mail.

Section 11.207 *Form for registration statement of individuals.*

Registration statements of individuals shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D.C. Filing may be made in person or by mail and shall be deemed to have taken place upon receipt thereof. Such registration statement shall be on a form hereby des-

ignated as Form IS-52, copies of which are available at the Internal Security Division.

REGISTERS

Section 11.300 *Public inspection of registers.*

Registration statements filed by individuals pursuant to section 8 of the act and, subject to the provisions of section 9(b) of the act, registration statements and annual reports filed by organizations under section 7 of the act shall be available for public inspection at the Internal Security Division, Department of Justice, Washington 25, D.C., from 10:00 a.m. to 4:00 p.m. on each official business day.

LABELING

Section 11.400 *Labeling of publications.*

Any publication transmitted or caused to be transmitted through the United States mails, or by any means or instrumentality of interstate or foreign commerce and required to be labeled pursuant to section 10(1) of the act shall bear the statement required by that section conspicuously marked at the beginning in the English language and in the language or languages used in such publication. The envelope, wrapper, or other container in which such publication is mailed, circulated, or transmitted shall bear the same statement in the English language in the lower left hand portion thereof.

This order supersedes Order No. 4147 of the Attorney General dated October 17, 1950, and Supplement 1 thereto dated November 15, 1950, Order No. 3-53 dated January 29, 1953, and Order No. 57-54 dated August 27, 1954, prescribing regulations governing the administration of sections 7, 8, 9, and 10 of the Subversive Activities Control Act of 1950.

This order shall become effective upon its publication in the *Federal Register*. Compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) as to notice of proposed rule making and delayed effective date is impracticable, unnecessary, and contrary to the public interest in this instance because (1) to the extent that the regulations prescribed by this order (other than those relating to procedure or practice) differ from existing regulations they relieve restrictions, and (2) such compliance would unduly delay the administration and enforcement of the Subversive Activities Control Act of 1950.

BYRON R. WHITE,
Acting Attorney General.

OCTOBER 3, 1961.

APPENDIX B

THE BACKGROUND AND PROVISIONS OF THE SUBVERSIVE ACTIVITIES CONTROL ACT

A. THE HISTORICAL BACKGROUND OF THE ACT

Following World War I, the powerful totalitarian political movements of Communism, National Socialism, and Fascism developed in Russia, Germany, and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies* (1938), 38 Colum. L. Rev. 591-622, 725-774. By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philosophies, but of external aggression aided by local Trojan-Horse groups serving the aggressive aims of their foreign principals.

As early as 1930, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced in various cities of the United States. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st

Sess. (1953), pp. 216-217. In 1934, the investigation was extended to Nazi propaganda activities. *Id.*, pp. 217-218. During the years 1930-1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country" (Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., part I, vol. 4, p. 384).

Also significant were the 1939 hearings before the House Committee on Un-American Activities, in which the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union (Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, *passim*). Congress had before it the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International*, adopted at the Second World Congress of the Communist International in 1920 (*id.*, vol. 7, pp. 4668-4671).¹ Among the "conditions" which a party aspiring to join the International was required to accept were: willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition 4); renunciation of "social patriotism," and systematic demonstration to

¹These *Theses, Statutes, and Conditions of Admission* are set forth in *Blueprint for World Conquests as Outlined by the Communist International* (Human Events, 1946), pp. 33-72.

the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6); recognition of the necessity of "complete and absolute rupture with reformism and the policy of the 'centrists'" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to "remove all unreliable elements" from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).^{*}

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International (Hearings before

^{*} *Blueprint for World Conquest as Outlined by the Communist International* (Human Events, 1946), pp. 66-72; Hearings before a Special Committee on Un-American Activities, H.R. 76th Cong., 1st Sess., vol. 7, pp. 4669-4671.

a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4308-4311, 4667-4668). For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party by that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinoviev (*id.*, p. 4432),^{*} and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.*, p. 4671)—

*** Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering upon a course leading toward an attempt to split the party, a course in violation of the 21 conditions and the statutes of the Comintern. [Emphasis added.]

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years, from which it could be concluded that both the Communist International and the Communist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong.,

^{*} The full text of this speech is set forth in the Appendix to the Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R. 71st Cong., 2d Sess., part I, pp. 876-882.

1st Sess., pp. 216-219; see also H. Rep. No. 153, 74th Cong., 1st Sess. (1935), p. 21.

Congress endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—i.e., Sections 2, 3, and 5 (now consolidated in 18 U.S.C. 2385)—it was made a criminal offense to advocate the overthrow of the Government by force and violence or to conspire so to advocate.⁴ The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Registration Act, c. 327, 52 Stat. 631, 22 U.S.C. 611-621, requiring the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated as follows (H. Rep. No. 1381, 75th Cong., 1st Sess., pp. 1-2; S. Rep. No. 1783, 75th Cong., 3d Sess., pp. 1-2):

Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.

⁴The constitutionality of this provision, as applied to a conspiracy charge against eleven of petitioner's national officers for the period from April 1, 1945, to July 20, 1948, was upheld in *Dennis v. United States*, 341 U.S. 494.

This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.

Various difficulties in the enforcement of the Foreign Agents Registration Act (see Report of the Institute of Living Law, 87 Cong. Rec., Appendix, pp. A4417-4419 (1941); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107) resulted in its amendment by the Act of April 29, 1942, c. 263, 56 Stat. 258, which strengthened the provisions and transferred the administration of the Act from the Secretary of State to the Attorney General. The Reports of the Attorney General to Congress on the Administration of the Foreign Agents Registration Act (which are required by 22 U.S.C. 621) detail the operation of that statute.

The purpose of Congress to expose the foreign origin of various propaganda activities was, however, not fully achieved, partly because of an increased tendency to bring information services under the aegis of diplomatic immunity (see Report of the Attorney General on the Administration of the Foreign Agents Registration Act, 1945-1949, p. 8; 1950 Report, pp.

5-6; 1951 Report, pp. 6-7), and partly because of controversy as to the scope of the "agency" covered by the statute. See *Viereck v. United States*, 318 U.S. 236, 242; *United States v. German American Vocational League*, 153 F. 2d 860, 864 (C.A. 3), certiorari denied, 328 U.S. 833; *United States v. Peace Information Center*, 97 F. Supp. 255, 258-259 (D. D.C.). The necessity of proving the fact of agency within the context of a criminal trial made difficult the enforcement of the Act against organizations which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control.

On October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U.S.C. 2386), requiring the registration, *inter alia*, of any organization "subject to foreign control which engages in political activity." The phrase "subject to foreign control" was defined in Section 1 of the Act as follows:

(e) An organization shall be deemed "subject to foreign control" if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization.

The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with respect to the purposes of the bill (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 1):

Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.

The principle upon which this bill is based is that there is no place in a democracy for undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See *Institute of Living Law, Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 *Univ. of Chi. L. Rev.* 107, 122-133. Since religious, charitable, scientific, literary, and educational organizations were excluded from the Act's coverage, propaganda organizations could seek to avoid registration by styling themselves under one of the excluded categories. There was no express provision making the officers guilty if a corporation or association failed to register. In the case of a corporation or unincorporated association without funds for the payment of fines, there were no appropriate sanctions to enforce compliance. While it was originally anticipated that

both the Communist Party and the German-American Bund would have to register under the Act (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorce. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *inter alia* (C.P. Ex. 13, p. 15):

That the Communist Party of the U.S.A., in Convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representatives as H.R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *

This disaffiliation and its stated purpose are not disputed by petitioner. Its spurious character was demonstrated by the testimony in this case. See Modified Report of the Board at R. 2510, 2512-2515.

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations believed, with reason, to be subversive but which veiled their true ends behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and

which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression* (1942), 37 Ill. [Northwestern Univ.] L. Rev. 193, 204-205; Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L. Q. 182, 201; Moore, *The Communist Party of the USA: An Analysis of a Social Movement* (1945), 39 Am. Pol. Sci. Rev. 31, 36-37.

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere Communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.^a Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada led to the establishment of a Royal Commission in Canada to investigate espionage activities being conducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Commission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission to Investigate the Facts Relating to and the Circum-*

^a Some details of this history are set forth in the Government's brief in *Dennis v. United States*, No. 336, Oct. Term, 1950, pp. 199-203.

stances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N.K.V.D. (Soviet secret police) in direct communication with Moscow (*id.*, pp. 11-13). It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent (*id.*, pp. 37-41). The Report quoted a statement by Gouzenko that (*id.*, p. 37)—

The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *.

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony" (*ibid.*).

The Commission found that the main recruiting ground for espionage agents was the illegally constituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents (*id.*, pp. 44-48, 69-83). Often a particular Communist agent would be selected for Colonel Zabotin's group on orders directly from Moscow (*id.*, pp. 44-48). It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments

of the Canadian government (*id.*, pp. 48-49, 97). Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy (*id.*, pp. 59-68).*

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character against the United Kingdom and the United States. See the New York Times, February 11, 1950, p. 2.

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States*, H. Rep. No. 1229, 82d Cong., 2d Sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work (*id.*, pp. 5-7, 15). Testimony by former Communist agents showed that Communist espionage groups had successfully infiltrated certain strategic areas of the Government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments* (Report of

*Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rose v. The King*, 3 [1947] D.L.R. 618, 88 Can. Cr. Cas. 114; *Boyer v. The King*, 94 Can. Cr. Cas. 196 (1948); *Rex v. Maserall*, 4 [1946] D.L.R. 791, [1946] Ont. Rep. 762; *Rex v. Lunan*, 3 [1947] D.L.R. 710, [1947] Ont. Rep. 201; *Rex v. Harris*, [1947] Ont. Rep. 461; *Rex v. Smith*, [1947] Ont. Rep. 378; *Rex v. Gerson*, [1947] Ont. Rep. 715.

*Since the passage of the Subversive Activities Control Act, in September 1950, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15); with the case of McLean and Burgess, the British diplomats, who fled to the Soviet Union; with subsequent defections from this country; and with Soviet espionage here.

the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st Sess., dated July 30, 1953); see also *United States v. Hiss*, 185 F. 2d 822, 829 (C.A. 2), certiorari denied, 340 U.S. 948. Espionage agents were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years, etc., op. cit., supra*, pp. 31, 35. Later, after the passage of the Subversive Activities Control Act, atomic and radar information was proved to have been passed to the Soviet Union by an international group. See *United States v. Rosenberg*, 195 F. 2d 583, 589, 598-601 (C.A. 2), certiorari denied, 345 U.S. 965; see also *Abel v. United States*, 362 U.S. 217.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950, 183 F. 2d 201 (C.A. 2), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit, *Dennis v. United States*, 341 U.S. 494, without finding it necessary to review the sufficiency of the evidence.

Armed warfare began in Korea in June 1950.

Thus, Congress had reason to believe, in September 1950, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that

there remained in existence a world Communist movement which endangered the security of the United States." This was the problem with which Congress undertook to deal in the Subversive Activities Control Act of 1950.

B. THE IMMEDIATE EVOLUTION OF THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. Efforts were made to remove objectionable features from early drafts and to define with precision the terms employed without leaving the remedial legislation vulnerable to the kind of calculated avoidance that had been the prime weakness of previous registration statutes.

The so-called "Mundt-Nixon" bill (H.R. 5852, 80th Cong., 2d Sess.) was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948 (94 Cong. Rec. 2893). As amended and reported out, Section 8 of the bill provided for registration with the Attorney General by "Communist political organizations" and "Communist-front organizations." The Attorney General was authorized under Section 13, either on his own initiative or at the request of either House of Congress, to make an investigation and conduct hearings to ascertain whether an organization was required to register.

In its report on the bill, the Committee on Un-American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act

⁵ See, in addition to the material referred to in the text, *The Strategy and Tactics of World Communism* (Report of the House Foreign Affairs Committee's Subcommittee No. 5 on National and International Movements), H. Doc. No. 619, 80th Cong., 2d Sess. (1948), pp. 3-4.

of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties" (H. Rep. No. 1844, 80th Cong., 2d Sess., p. 5). It was also stated that, while the Alien Registration Act of 1940—i.e., the Smith Act—made it a crime to advocate the overthrow of the Government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence" (*ibid.*). The report also indicated that ten years' investigation by the Committee had established (*id.*, p. 2)—

(1) That the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Senate Judiciary Committee, to which the House bill was referred, sought the advice of several prominent lawyers and the then Attorney General as to the constitutionality of the bill (see 94 Cong. Rec. 9028). The legal memoranda received in response to this request are set out at pp. 415-428 of Hearings before the Committee on the Judiciary, Senate, 80th

Cong., 2d Sess., on H.R. 5852; see also *id.*, pp. 428-488.⁹ The principal objection of those who thought the bill had constitutional defects was that the bill used such terms as "Communist political organization" and "Communist-front organization" without adequately defining those terms, and therefore furnished the Attorney General with no definite legislative guide in determining whether an organization was required to register.

A new version of the bill was prepared (see 94 Cong. Rec. 9028, 9029-9032). It more specifically defined in its Section 3 the terms "Communist political organization" and "Communist-front organization," and set forth in Section 7 the duty of such organizations to register with the Attorney General and to file annual reports. In place of the provision for an administrative determination by the Attorney General, the new bill (Sections 12, 13) provided for a Subversive Activities Board which was to make the determination as to whether a given organization was required to register, with further provision for judicial review of its determinations.

The redrafted bill—known as the "Mundt-Ferguson-Johnston" bill—was introduced in the First Session of the 81st Congress as S. 2311.¹⁰ The opinions of various prominent attorneys were again solicited and the consensus appeared to be that in respects here relevant the bill met the constitutional objections theretofore raised and at the same time avoided the

⁹ See also the analysis of the bill in Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948-1949), 34 Corn. L. Q. 182-219, 352-375.

¹⁰ S. 2311 evolved after extensive hearings before a subcommittee of the Senate Judiciary Committee from S. 1194 and S. 1196, which were originally introduced in the 81st Congress.

weaknesses of prior legislation (S. Rep. No. 1358, 81st Cong., 2d Sess., pp. 7, 16-17).

The Internal Security Act, of which the Subversive Activities Control Act is a constituent part (Title I), was passed on September 23, 1950, over the President's veto. Both the House and Senate committee report reemphasized the pressing need for bringing Communist organizations out in the open through the medium of registration requirements (H. Rep. No. 2980, 81st Cong., 2d Sess., on H.R. 9490; S. Rep. No. 2369, 81st Cong., 2d Sess., on S. 4037; S. Rep. No. 1358, 81st Cong., 2d Sess., on S. 2311). The House committee report reiterated the fact that prior legislation directed to this end had been ineffectual against the Communist Party itself, and cited the fact that 30 of the 70 major countries of the world had outlawed the Communist Party (H. Rep. No. 2980, 81st Cong., 2d Sess., p. 2). The report further noted that the Committee had rejected proposals to outlaw the Communist Party or to make membership therein illegal *per se*, and emphasized that the "Communist organization of the United States" was not made guilty of any offense by reason of the enactment of the Act (*id.*, p. 5).

G. THE STRUCTURE AND PROVISIONS OF THE ACT

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781-798. It has been amended, insofar as it relates to Communist-action organizations and their members, four times—in a relatively minor detail by the Act of July 29, 1954, 68 Stat. 586; again, in a more substantial manner, by the Communist Control Act of August 24, 1954, Sections 6-11, 68 Stat. 775, 777-780; and finally in minor details by the

Acts of August 20, 1958, and May 31, 1962, 72 Stat. 950, 76 Stat. 91. In view of the length of the Act and the complex interlocking of its numerous sections and subsections, a summarization of its principal provisions may be helpful. Rather than a mere section-by-section summary, the effort will be to present an over-all view showing the structure of the Act, with emphasis on the essentials of the registration scheme and the nature of the legal consequences which attach to an organization's act of registering (or being ordered to register) both as they affect the organization itself, considered as an entity, and as they affect individual members of the organization and others.

1. The Congressional findings as to the necessity for the legislation

Section 2 sets forth in fifteen numbered paragraphs certain findings—based on “evidence adduced before various committees of the Senate and House of Representatives”—which convinced Congress of the necessity for the legislation. Congress found, for example, that “[t]here exists a world Communist movement” consisting of a “world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization” (Section 2(1)). The “direction and control” of this movement was found to be “vested in and exercised by the Communist dictatorship of a foreign country,” not named in the Act (Section 2(4)). This foreign Communist dictatorship, it was further found, establishes “action orga-

nizations" in various countries, these organizations being part of a world-wide Communist organization and controlled by the foreign dictatorship (Section 2(5)). These "Communist-action organizations" seek to bring about "the overthrow of existing governments by any available means, including force if necessary" and to set up in their stead local Communist dictatorships subservient to the parent dictatorship (Section 2(6)). These Communist organizations "are organized on a secret, conspiratorial basis" and operate to a substantial extent through organizations known as "Communist fronts," which are maintained and used so as to conceal "their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such 'Communist fronts'" (Section 2(7)). Finally, Congress found (Section 2(15)):

The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in

other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

2. "Communist-action" and "Communist-front" organizations

"Communist-action organization."—The Act defines a "Communist-action organization" as "any organization in the United States," other than one diplomatically accredited, which "is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2" and which "operates primarily to advance the objectives" of that movement "as referred to in section 2" (Section 3(3)).

"Communist-front organization."—A "Communist-front organization" is defined as "any organization in the United States" which is "substantially directed, dominated, or controlled by a Communist-action organization" and "is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement" (Section 3(4)).

3. *The registration scheme*

The heart of the Act—the organizational registration requirement—is contained in Section 7.

The duty of Communist-action and Communist-front organizations to register with the Attorney General.—Each Communist-action organization (Section 7(a)) and each Communist-front organization (Section 7(b)) is required to “register with the Attorney General, on a form prescribed by him by regulations” as the one or the other type of organization. Registration is to be effected within thirty days after enactment of the Act (Section 7(c)(1)), or, in the case of an organization which becomes registerable after the Act’s passage, within thirty days after becoming registerable (Section 7(c)(2)). In the case of an organization which does not voluntarily register and which is subsequently ordered to register by the Subversive Activities Control Board, registration must be effected within thirty days after the Board’s order becomes final¹¹ (Section 7(c)(3)).

The registration statement.—The registration process includes the submission of a registration statement, to be prepared in accordance with regulations, containing certain specified information (Section 7(d)). The information is to include (1) the name and address of the organization, (2) the name, address, title, and duties of each officer of the organization, including each person who has been an officer at any time during the preceding year, (3) an accounting of all funds received and spent by the organization during the preceding year, including the sources of the funds and the purposes of the expenditures, (4) (ap-

¹¹ The process leading to an order by the Board to register is provided for in Section 13. The conditions under which a Board order becomes final are set forth in Section 14(b).

plicable to Communist-action organizations only) the name and address of each member of the organization, including each person who has been a member at any time during the preceding year, (5) any aliases that may ever have been used by any officer or member required to be listed, and (6)¹¹ a list of all printing presses and other mechanical devices used in printing in the possession or control of the organization, its officers, or members.

Annual reports.—Annual reports are required to be submitted to keep the initial registration statement up to date (Section 7(e)).

Records required to be kept.—Accurate financial records are required to be kept by all registered organizations (Section 7(f)(1)). In addition, action organizations are required to keep accurate membership lists (Section 7(f)(2)).

Remedies open to persons claiming to be wrongly listed.—Section 7(g) provides remedies for persons who are listed by reporting organizations as being officers or members and who deny that they are such. The Attorney General is required to notify all individuals whom reporting organizations list as officers or members that they have been so listed. Any listed individual who denies that he is an officer or member may request the Attorney General to strike his name from the statement. In that event, the Attorney General is required to investigate the matter, and if he is satisfied that the denial is correct, he is to strike the individual's name. If he is not satisfied that the denial is correct and declines to strike the name, or if he fails to strike it within five months after receiving the request, the individual may petition the Board

¹¹ Added by the Act of July 29, 1954, 68 Stat. 586.

pursuant to Section 13(b) for an order requiring the Attorney General to strike his name.

Publication to constitute notice.—Upon the registration of an organization, the Attorney General is required to publish in the Federal Register the fact that the organization has registered as a Communist action or Communist-front organization as the case may be (Section 9(d)). Such publication, it is provided "shall constitute notice to all members of such organization that such organization has so registered" (*ibid.*).

Keeping of registers.—The Attorney General is required to keep registers of all organizations which register, consisting of the names and addresses of the organizations and their registration statements and annual reports (Section 9(a)). The registers are to be open to public inspection, except that the name of any person listed by an organization as being an officer or member who denies his status as such may not be made public pending determination by the Attorney General of the correctness of the listing (Section 9(b)).

4. *Proceedings before the Board leading to orders requiring organizations to register*

Section 13 of the Act provides for quasi-judicial proceedings before the Subversive Activities Control Board leading to orders requiring, or refusing to require, organizations claimed by the Attorney General to be action or front groups to register with him as such. The Board itself is established and its general powers and functions defined in Section 12.

The petition by the Attorney General.—Whenever the Attorney General has reason to believe that any organization which has not registered under Section 7(a) as an action organization or under Section 7(b)

as a front organization "is in fact an organization of a kind required to be registered under such subsection," he is required to file with the Board and serve upon the organization a petition for an order requiring the organization to register (Section 13(a)).

Hearings before the Board.—Upon the filing of such a petition, the Board (or any member or a designated examiner) holds a hearing to inquire into the facts regarding the organization's registerability (Section 13(c)). The administration of oaths and the issuance of subpoenas are provided for (*ibid.*). Hearings are public, and each party is entitled to present its case with the assistance of counsel, to offer oral or documentary evidence, and to cross-examine opposing witnesses (Section 13(d)).

Types of evidence required to be considered.—Section 13(e) sets forth in eight numbered paragraphs certain types of evidence which the Board is required to consider in determining whether an organization is a Communist-action organization under Section 3(3). For example, the Board is to take into consideration:

(1) the extent to which its [the organization's] policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 * * *.

Similarly, Section 13(f) sets forth four evidentiary factors required to be taken into consideration in determining whether an organization is a front group under Section 3(4). These factors are the extent to which (1) the persons who are active in managing the

organization are active in managing any Communist-action organization; (2) the organization's financial or other support came from any Communist-action organization; (3) its financial resources and personnel are used to promote the objectives of any Communist-action organization; and (4) the positions taken by it do not deviate from those of any Communist-action organization.

Reports and orders.—If the Board determines that the organization is a Communist-action or Communist-front organization, it must make a report stating its finding of fact and issue an order requiring the organization to register (Section 13(g)(1)). If it determines that the organization is not such a group, it so reports and issues an order denying the Attorney General's petition (Section 13(h)(1)).

Publication to constitute notice.—When an order of the Board requiring registration of a Communist-action organization becomes final, that fact must be published in the Federal Register and such publication is declared to "constitute notice to all members of such organization that such order has become final" (Section 13(k)).

5. The duty of individuals to register under certain circumstances

The Act also imposes upon individuals a duty to register under certain circumstances.

(a) Officers required to effect an organization's registration

If a Communist-action or Communist-front organization should fail to register or to file a registration statement or annual report as required by Section 7, it is the duty of the executive officer and of the secretary of the organization (or the individuals performing the usual duties of such officers), and of such

other officers as the Attorney General may by regulations prescribe, to register for the organization or to file the registration statement or annual report, as the case may be (Section 7(h)). Pursuant to this authority, the Attorney General has designated the following additional officers as sharing with those named in the Act the responsibility of effecting the registration of an organization which is required to register but fails to do so: (a) the president, chairman, or other person who is chief officer; (b) the vice-president, vice-chairman, or person performing the functions of either; (c) the treasurer; and (d) members of the governing board, council, or body. 28 C.F.R. 11.205.

(b) Personal registration of members of Communist-action organizations

Conditions under which required.—The Act specifies two conditions under which members of a Communist-action organization are required to register personally with the Attorney General. First, if there is in effect a final order of the Board requiring the action organization to register and more than thirty days elapse without compliance, it becomes the duty of each member of the organization to register personally (Section 8(a)). Secondly, if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, each member not on the list who knows the organization to be registered and to have omitted his name must himself register within sixty days after obtaining such knowledge (Section 8(b)). In either case, the individual is required to file a registration statement containing such information as the Attorney General may by regulations prescribe (Section 8(c)).

Proceedings before the Board.—If an individual who the Attorney General believes is required to reg-

ister under Section 8, does not in fact register, the Attorney General may petition the Board (as in the case of an organization) for an order requiring the individual to register (Section 13(a)).

Hearings.—The Attorney General's petition for an order to require an individual to register is heard by the Board in the same manner as a petition for an order requiring an organization to register (see p. 171 above) (Section 13(e) and (d)).

Reports and orders.—In each instance the Board must make a report stating its findings and issue an order either requiring the individual to register (Section 13(g)(2)), or denying the Attorney General's petition (Section 13(h)(2)).

6. Fact of registration not admissible in any criminal prosecution and membership not to constitute *per se* a violation of any criminal statute

The fact of the registration of any person as an officer or member of any Communist-action or Communist-front organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (Section 4(f)). In addition, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute (*ibid.*).

7. Cancellation of registration

The Act establishes procedures whereby an individual or an organization which has once registered—whether with or without an order of the Board commanding him or it to do so—may procure the cancellation of his or its registration in the event of a change in the circumstances which originally required registration.

Application to the Attorney General.—Any organization registered under Section 7 as an action or front group, and any individual registered under Section 8, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration (Section 13(b)).

Petition to the Board.—If the Attorney General denies the application, the organization or individual concerned may, within sixty days after such denial, file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of registration (Section 13(b)).

Hearings.—The petition is heard by the Board in the same manner as a petition by the Attorney General requesting that an organization or individual be directed to register (Section 13 (c) and (d)).

Reports and orders.—In each case the Board must make a report stating its findings and issue an order granting (Section 13(i)) or denying (Section 13(j)) the petition.

8. Judicial review and finality of Board orders

The Act provides that any party aggrieved by any order of the Board be given full opportunity for judicial review either in the United States Court of Appeals for the District of Columbia Circuit or in the circuit of the petitioning party's residence, with the possibility of further discretionary review by this Court on writ of certiorari (Section 14(a)). On such review the Board's findings of fact, if supported by the preponderance of the evidence, are conclusive (*ibid.*)

Exhaustion of judicial review a prerequisite to an order of the Board becoming final.—An order of the Board does not become final, *i.e.*, enforceable, until full opportunity for judicial review has been ex-

hausted or until review is foreclosed by failure to make timely application therefor (Section 14(b)).

9. The legal consequences of an organization's registration or of a final order to register

When an organization registers under Section 7, or when an order of the Board under Section 13 requiring an organization to register becomes final under Section 14(b), the Act provides for the immediate occurrence of certain legal consequences—one affecting the organization as such, the others affecting members of the organization. In addition, upon the registration of an organization or when an order directing it to register becomes final, certain limitations are imposed upon the conduct of officers and employees of the United States and of “defense facilities,” as defined in the Act, with respect to their relations with the organization and its members. These various legal consequences may be summarized and classified as follows:

(a) Consequence to the organization as such

The “labeling” requirements.—When an organization is registered or has been finally ordered to register, any publication of the organization transmitted by mail or in interstate or foreign commerce and intended to be circulated among two or more persons must bear on its face and on any wrapper in which it is contained the printed statement “Disseminated by [name of organization], a Communist organization” (Section 10(1)). Similarly, radio and television broadcasts sponsored by the group must be identified as being “sponsored by [name of organization], a Communist organization” (Section 10(2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (Sections 10, 15(c)).

(d) *Consequences to members of, and contributors to, the organization*

Denial of tax benefits.—Persons making contributions to any organization which is registered or has been finally ordered to register may not deduct the amount of their contributions from their gross taxable income notwithstanding any other provisions of law (Section 11(a)), and no such organization may claim any tax-exemption privilege specified in Section 101 of the Internal Revenue Code (Section 11(b)).

Employment restrictions.—Section 5(a)(1) provides that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from (A) concealing or failing to disclose their membership in seeking, accepting, or holding any non-elective federal employment, (B) holding such employment, (C) concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility,¹³ (D) working in any defense facility (this clause is applicable only to members of action organizations), or (E)¹⁴ "holding office in or being employed by any "labor organization" as defined in the National Labor Relations Act¹⁵ or rep-

¹³ A "defense facility" is defined in Section 3(7), as amended by the Act of May 31, 1962, 76 Stat. 91, as any plant, factory, airport, vessel, pier, etc. "designated by the Secretary of Defense pursuant to section 5(b)."

¹⁴ Added by the Communist Control Act of 1954, Section 6, 68 Stat. 777.

¹⁵ I.e., "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152(5).

representing any employer in proceedings under that Act.

Provisions applicable to aliens.—Alien members of or aliens affiliated with organizations which are registered or have been finally ordered to register are excluded from admission into the United States, are deportable, and are ineligible for naturalization." The joining of or affiliating with an organization so registered or required to register, within five years after naturalization, if naturalization occurs after the effective date of the Immigration and Nationality Act of 1952, is declared to constitute *prima facie* evidence, warranting revocation of citizenship in a denaturalization proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of naturalization."

¹⁶ These provisions were originally contained in Sections 22 and 25 of the Subversive Activities Control Act, which amended the immigration and naturalization laws. They are now contained in the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, Section 212(a)(28)(E) (exclusion) 241(a)(6)(E) (deportation), and 313(a)(2)(G) and (H) (ineligibility for naturalization). If the alien can establish that he did not know the organization in question to be a Communist organization when he joined it and did not acquire such knowledge prior to the time it registered or was required to register, the provisions are by their terms inapplicable, except that members of action organizations are declared ineligible for naturalization without such qualifying language.

¹⁷ As amended and carried forward in Section 340(c) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 261.

(Sections 10, 15(c)).

(c) *Consequences to government and defense-facility employees in their relations with the organization and its members*

Contributions to registered organizations forbidden.—When an organization is registered or has been finally ordered to register, officers and employees of the United States and of defense facilities, having knowledge or notice of that fact, are prohibited from contributing funds or services to such group (Section 5(a)(2)(A)).

Counseling violation of employment provisions.—Section 5(a)(2)(B) makes it a punishable offense for an officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to advise or counsel any person whom he knows to be a member of such organization to perform or omit the performance of any act the performance or omission of which would constitute a violation of the employment provisions of Section 5(a)(1).¹⁹

10. Criminal penalties

Organizations.—Any organization which has been directed by a final order of the Board to register and which fails to do so within the time allowed, or which fails to file a required registration statement or annual report or to keep records as required, is

¹⁹ In addition, the Act provided that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register were prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (Section 6(a)) and federal employees were prohibited from using or renewing passports to any individual they knew or had reason to believe were members of such organizations (Section 6(b)). This provision was held unconstitutional in *Aptheker v. Secretary of State*, 378 U.S. 500.

punishable for each such offense by a fine of not more than \$10,000 (Section 15(a)(1)). Each day of failure to register is a separate offense (Section 15(a)). Each violation of the labeling provisions of Section 10 (see p. 177 above) is similarly punishable (Section 15(c)).

Individuals.—Each individual officer having a duty under Section 7(h) to register or to file a registration statement or annual report on behalf of an organization which has been finally ordered to register (see p. 173 above) is punishable for each failure to fulfill such duty by a fine of not more than \$10,000, or imprisonment for not more than five years, or both (Section 15(a)(2)). Each individual having a duty to register personally under Section 8 (see p. 174 above) is similarly punishable, provided there is in effect with respect to him a final order of the Board requiring him to do so (Section 15(a)(2)). In either case, each day of failure to register is a separate offense (Section 15(a)). The willful making of a false statement or the willful omission of a fact required to be stated is similarly punishable (Section 15(b)). Each false statement or willful omission constitutes a separate offense (Section 15(b)(1)), and each listing of the name or address of any one individual is to be deemed a separate statement (Section 15(b)(2)).

Any individual who violates any of the employment provisions or the contributions prohibition of Section 5, or the labeling provisions of Section 10, is punishable for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or both (Section 15(c)).

Act not to affect previously existing criminal statutes.—The Act provides that its provisions are to be

construed as being "in addition to and not in modification of existing criminal statutes" (Section 17).

11. Communist-infiltrated organizations

The Act as originally passed defined and dealt with but two types of "Communist organization" (Section 3(5))—the Communist-action organization (Section 3(3)) and the Communist-front organization (Section 3(4)). The Communist Control Act of 1954, Sections 7-11, 68 Stat. 775, 777-780, amended the Act so as to define a third category of Communist organization, viz., the "Communist-infiltrated organization," and to enact various restrictive measures with respect to such groups.

Communist-infiltrated organizations are not subject to the registration requirements of the Act. They are, however, subject to Board orders "determining" them to be Communist-infiltrated, which orders, when they become final, entail for such groups some of the same legal consequences which attach to action and front groups when registered or directed to register by a final Board order. "Infiltrated" organizations are defined in Section 3(4A). Proceedings leading to a Board order determining an organization to be Communist-infiltrated are provided for in Section 13A. Such orders are reviewable in the same manner as other orders of the Board (Section 13). The legal consequences which flow from a final Board order determining a group to be infiltrated are set forth in Sections 10, 11, 13A(h), and 13A(j).

12. Separability clause

The Act contains the customary separability clause providing that, if any of its provisions or the application thereof to any person or circumstances is held

invalid, the remaining provisions, or the application to other persons or circumstances of any provisions held invalid as to some, shall not be affected thereby (Section 32).

The Act as originally passed defined and dealt with but two types of "Communist organization" (Section 3(2))—the Communist-action organization (Section 3(3)) and the Communist-front organization (Section 3(4)). The Communist Control Act of 1954, Sections 1-11, §§ 204-210, 777-780, amended the Act so as to define a third category of "Communist organization," and to enact various restrictive measures with respect to such groups.

Communist-infiltrated organizations are not subject to the registration requirements of the Act. They are, however, subject to Board orders "determining" them to be Communist-infiltrated, which orders, when they become final, entail for such groups some of the same legal consequences which attach to action and front groups when registered or directed to register by a final Board order. "Infiltrated" organizations are defined in Section 3(4A). Proceedings leading to a Board order determining an organization to be Communist-infiltrated are provided for in Section 13A. Such orders are reviewable in the same manner as other orders of the Board (Section 13). The legal consequences which flow from a final Board order determining a group to be infiltrated are set forth in Sections 10, 11, 12A(b), and 13A(1).

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Application for writ of habeas corpus and for writ of certiorari to the Supreme Court of the United States from the United States Court of Appeals for the District of Columbia Circuit, in the case of *William Albertson and Roscoe Quincy Proctor*, Petitioners, against the *Subversive Activities Control Board*.

IN THE

Supreme Court of the United States

October Term, 1965

No. 3

WILLIAM ALBERTSON and
ROSCOE QUINCY PROCTOR,

Petitioners,

vs.
SUBVERSIVE ACTIVITIES CONTROL BOARD,

Comes by Petitioners to the United States Court of
Appeals for the District of Columbia Circuit

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Office Supreme Court, U.
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OCT 12 1965

JOHN F. DAVIS, CLERK

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Supreme Court of the United States
October Term, 1965

No. 3

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SUBVERSIVE ACTIVITIES CONTROL BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR PETITIONERS

I. The purpose of the member registration requirement.

Our principal brief (pp. 15-41) argued that the member registration requirement of the Act violates the privilege against self-incrimination, due process and the First Amendment. In connection with the constitutional challenge on these grounds, the brief showed that the requirement lacks a governmental purpose. To compel self-registration as members of the Communist Party by persons whom the Board has found to be members performs no disclosure function (Pet. Br. 33-34, 38-39, 41), does not aid in law enforcement (Pet. Br. 26-27, 30), and serves no other public interest.

In reply, the government states (Br. 22) that, "The sole purpose of registration, we submit, is to place the name of the registrant on the public list which the Attorney General is required to keep pursuant to section 9(a) of the Act."

The first fallacy of this theory is that its premise is false. Section 9(a) does *not* require the Attorney General to keep a list of member-registrants. The required list is confined to *organizations* which register. All that section 9(a) calls upon the Attorney General to keep with respect to individuals is "the registration statements filed by [them] under section 8." Congress could, of course, have provided for the filing of these statements without requiring registration. As the government acknowledges, therefore, "the act of 'registration' per se is not justified by the need for [a registration statement]." ¹ And nothing in the Act requires the registration *statement* to call upon the signatory to admit membership in the Communist Party. Hence, the admission of membership in the Communist Party which the act of registration exacts has nothing to do with the performance of the duties of the Attorney General under section 9(a).

Second, even if Congress had thought it desirable to make provision for what the government calls "centralizing the roster" (Br. 30, n. 15) it could easily have done so by a method that would have avoided the most obvious constitutional objections to compulsory self-registration. For, as the government concedes (Br. 22), "Congress could, of course, have achieved the same result by empowering the Board to register all those found by it to be members." Finally, it is preposterous to suppose that the Act's fantastic cumulative penalties for failure to register were imposed merely to accomplish the insignificant clerical objective that the government attributes to Congress.

Elsewhere in its brief, the government suggests three other possible Congressional purposes for the member registration requirement.

¹ In fact, the Act makes the duty to file the statement ancillary to the registration requirement so that the invalidity of the latter dispenses with the former. See Pet. Br. 34 and *infra*, pp. 9-10.

First, it is said (Br. 32) that compulsory self-registration will promote voluntary compliance since persons would "not be encouraged to register" if they "could avoid any personal involvement" by waiting until the Board found them to be members. The notion is fanciful. It is also unrealistic, as is shown by the fact that not a single person has registered (either voluntarily or pursuant to Board order) as a member of the Communist Party in the four years of its non-compliance with the final registration order against it. Moreover, the argument contradicts the contention, running throughout the government's brief, that registration is "a neutral act" (Br. 11) of no consequence to the registrant. In fact, what the government calls "personal involvement" is its euphemism for self-incrimination, self-defamation and foreswearing—the very features that make compulsory self-registration unconstitutional.

Next, the government argues (p. 32) that "the registration procedure is a means of obtaining from the registrant responses to the inquiries on the registration statement." But the government nullifies its own argument by conceding (*ibid.*) the obvious fact that these responses could have been obtained just as well without imposing the registration requirement.

Finally, the government suggests (Br. 33) that "personal registration has the virtue of keeping the records current." This is not so for two reasons. First, the duty of an individual under section 8 is at an end once he registers and files a registration statement. The Act contains no provision for keeping information with respect to member-registrants current.² Contrary to the government's assertion (*ibid.*) the Attorney General is therefore powerless to require periodic re-registration or notification of a change of address. Second, Congress could, of course, have required persons found by the Board to be members of a

² Unlike the case of registered organizations which are required to file annual reports. Sec. 7(c).

Communist-action organization to furnish the Attorney General with their current addresses, without also requiring them to register as members of the organization.³

The government's inability to unearth a legitimate purpose for the member registration requirement confirms petitioners' position that there is none. The plain fact is that the purpose of the requirement is not to get voluntary compliance, or a centralized roster of Communists, or current information about them, but to "get" the Communists themselves. This is done by offering them the alternatives of forfeiting their human dignity and self respect by registering or incurring life imprisonment for refusal to register. Born of the savage anti-Communist hysteria of the early 1950's the device of compulsory self-registration bears the imprint of its time and admits of no other purpose.

It is against this background that the government's defense of the member registration requirement must be considered.

II. The privilege against self-incrimination.

A. Registration.

1. Prematurity.

The government now concedes (Br. 6) that "to the extent petitioners contend that any form of compulsory registration adequate to satisfy the standards of section 8 would violate the Fifth Amendment privilege, their claim is now ripe for adjudication." But it adds (*ibid.*) that, "Insofar, however, as they challenge any particular inquiry made on the Registration Form . . . their contention is premature." As will be seen, neither the Board's orders nor the registration form IS-52a⁴ make demands beyond

³ The address requirement would, of course, be subject to a claim of the privilege against self-incrimination. See Pet. Br. 23-24 and *infra*, p. 11.

⁴ With the exception of the insignificant detail of the registrant's address demanded by the form.

those required by section 8. Accordingly, the government's reservation is of no consequence.

Section 8 specifically provides that a person who is under a duty to register because of membership in an organization found to be a Communist-action organization shall "register as a member of such organization." Pursuant to this statutory command, the Board ordered each petitioner to "register . . . as a member of the Communist Party of the United States of America" (R. 26, 58).⁴² In accordance with section 8 and the Board's orders, the Attorney General adopted a form the execution of which by petitioners would require each of them to state that he "hereby registers as a member of the Communist Party."

The text of section 8 would seem to require a registrant not only to name the organization in which he holds membership but to describe it as a Communist-action organization. Moreover, since the duty to register is predicated on a finding that the organization is a Communist-action organization, recognition of the correctness of the finding is implicit in the act of registering. Accordingly, the Board ordered petitioners to register as members "of the Communist Party of the United States of America, a Communist-action organization" (R. 26, 58). The Attorney General has never objected to this interpretation of section 8 and has adopted it in the registration form which follows the language of the orders. In any case, as the government acknowledges at one point (Br. 17-18), petitioners are obviously entitled to an adjudication of their claims as they relate to the Board's orders as well as to the requirements of section 8.

2. The merits of petitioners' claims.

The government points out (Br. 19-20) that the Act differs from registration statutes like the firearms statute (26 U. S. C. 5841) invalidated in *Russell v. United States*, 306 F. 2d 402. Legislation of the latter type punishes per-

⁴² Orders in this form are also required by sec. 13(g).

sons in a defined class that is linked to criminal conduct for failing to come forward and register themselves as members of the class. Under the Act, on the other hand, the government has the burden of identifying a person as a member of the class before his obligation to register arises. This distinction does not eliminate the Act's vice of compulsory self-incrimination.

The government reasons (Br. 19-21, 26-27) that there is no constitutional objection to compelling admissions which are incriminating on their face if the government is already in possession of the facts to be admitted, since in that event the admission gives the government no new leads and is not genuinely incriminating. By this logic, the statute in *Russell* would have been constitutional as to any person whom the government knew to be in the illegal possession of firearms at the time the duty to register them arose. *Russell* contains no such qualification because, contrary to the government's contention, the privilege protects against *any* disclosure that would link the person making it to an area of criminal activity, whether or not the government is in possession of independent evidence of the link. See Pet. Br. 27-29. There is nothing to the contrary in *Hoffman v. United States*, 341 U. S. 479, *Heike v. United States*, 227 U. S. 131, or *Mason v. United States*, 244 U. S. 362, relied on by the government (Br. 21, 27). They simply stand for the proposition that there must be some recognizable connection between the disclosure which is sought and criminal conduct.⁵

The government also points out (Br. 20, n. 10) that statutes of the *Russell* type "may induce otherwise unwilling members of the class to come forward and register,"

⁵ Thus in *Hoffman*, the Court did not think it relevant to inquire whether the government already knew the answers to the questions that Hoffman refused to answer. When it appeared that the answers might have linked him to racketeering, the inquiry was at an end, and his claim of privilege was sustained.

while the Act exerts no coercion in advance of a registration order. This distinction is immaterial. The statute in *Russell* was not invalidated because it improperly induced members of the class to register but because it punished those who refused to register, thereby violating their privilege.

The government states (Br. 21) that Congress did not intend the Act "to pry damaging admissions from unwilling members." The statement is both irrelevant and untrue. It is irrelevant because, whatever Congress may have intended, the Act does, in fact, coerce incriminating admissions of membership in the Communist Party from unwilling persons. The statement is untrue because the text of section 4(f) and its legislative history, detailed in *Scales v. United States*, 367 U. S. 203, 210-219, make crystal clear that Congress knew that the member registration requirement would compel persons to make incriminating admissions within the protection of the privilege, but that it was unwilling to grant them the full immunity which *Counselman v. Hitchcock*, 142 U. S. 547, requires. In the face of this legislative history, it is ludicrous for the government to assert (Br. 24) that, "It is entirely clear from Section 4(f) of the Act that Congress was not intending to have compulsory registration serve as an admission of any incriminating fact."

The government argues (Br. 22, 29) that registration as a member of the Communist Party is a form of self-identification, "indistinguishable" from fingerprinting and similar non-testimonial acts which, it says are not protected by the privilege. But whatever may be true of fingerprinting or other evidentiary uses of the body of an accused, self-registration is an act of communication and, thus, is indisputably within the protection of the privilege. *Holt v. United States*, 218 U. S. 246, 253, on which the gov-

ernment relies (Br. 29), makes this very distinction between communication and evidentiary use of the body.⁶

Again, it is argued (Br. 23) that registration does not constitute an admission of membership but admits only that the registrant "has been found to be a member." This is plainly not so, since the Act, the order of the Board and the registration form all oblige him to register "as a member." See *supra*, p. 5. Moreover, section 8 imposes the duty to register on, "Any individual who is . . . a member." Hence, registration, ipso facto, constitutes an acknowledgment of the fact that the registrant is (not merely has been found to be) a member.

The Act, therefore, does not permit registrants to add qualifying language to the registration form, as the government now suggests (Br. 23) that they may. Nor does the order of the Board permit this. Contrary to the government's assertion (Br. 23, n. 12) Congress *did* intend "to authorize an administrative agency to extort confessions of wrongdoing," and the agency has done so. Accordingly, the flaw of compelling self-incrimination is in the Act and cannot be cured by revising the orders of the Board, or, as the government suggests (Br. 23), the Attorney General's form.

Finally, the government argues (Br. 24) that any admissions required of a registrant are not incriminating because the rule against the admissibility of involuntary confessions would bar their use against him. This argument stands the privilege on its head. The rule of *Counselman*, which the government accepts, is that an incriminating admission may not be *compelled* without a grant of absolute

⁶ The same distinction disposes of the government's contention (Br. 29) that the disclosures called for by the registration statement may be compelled because they are "no different from the various nontestimonial acts which a criminal defendant may be compelled to perform."

immunity. See Pet. Br. 25-29; G. Br. 25.⁷ The Act contains no such grant. Hence it violates the privilege.

The government's disingenuous refusal to recognize the violation of the Fifth Amendment privilege which this case presents is epitomized in the statement (Br. 29) that, "the Act prescribes no more in its present form than if Congress had chosen . . . to allow the Attorney General to 'register' all those found by the Board to be members of Communist-action groups." It is odd that the government must be reminded that the Amendment protects against *self-incrimination*.

B. The registration statement.

Since, as we have shown, petitioners may not be required to register with the Attorney General pursuant to section 8(a) and the orders of the Board, they are under no duty to file registration statements pursuant to section 8(c). This follows from the text of 8(c) which provides that registration under 8(a) "shall be *accompanied by* a registration statement." Obviously, a registration statement cannot "accompany" a non-existent registration. The fact that the obligation to file a registration statement is ancillary to the act of registration is borne out by section 15(a) which imposes daily cumulative penalties for failure to register but not for failure to file the statement. This interpretation is also required by the principle of the strict construction of criminal statutes.

We advanced the foregoing construction of section 8(c) in our principal brief (p. 34). Although the government has not replied directly, it states (Br. 29) that a registration statement "does nothing more than identify *the registrant*

⁷ The related principle of due process forbids the admission in evidence of coerced confessions. The purpose of this principle is not only to prevent convictions on such evidence but also, like the privilege, to deter an uncivilized practice. *Blackburn v. Alabama*, 361 U. S. 199, 206-07. And see Pet. Br. 27.

as the same man found by the Board to be a member of a Communist-action group" (emphasis supplied). But if there is no "registrant," there is no one to identify and the statement is functionless. At another point, the government (Br. 16) speaks of "the Board's power to compel the bare act of registration and the submission of *an accompanying statement*" (emphasis supplied). It would seem, therefore, that the government agrees that the duty to file a statement is imposed only on those who register.*

If the Court agrees with this interpretation of section 8(c) and sustains petitioners' claims of privilege with respect to the act of registration, the controversy with respect to the registration statements will automatically be disposed of. We will address ourselves nevertheless to the government's contentions on this branch of the case.

The government concedes (Br. 15) that petitioners' claims of privilege with respect to the registration statement are ripe for adjudication, "if all conceivable complying disclosures would violate such a privilege"—i.e., if their privilege would be violated by any demand for information that section 8(c) authorizes the Attorney General to make.

The government nowhere discusses the extent of the Attorney General's authority to demand information under the sweeping terms of section 8(c). Nor does it reply to our contention (Br. 34-35) that the section is an invalid delegation of legislative power and a violation of the Fourth Amendment because the authority of the Attorney General is undefined and unlimited. If section 8(c) can be saved by construction, however, the permissible range of inquiry

* This construction does not attribute to Congress the intention of giving a bonus to persons who refuse to register when ordered to do so. It simply reflects the common-sense view that there is no point in imposing an additional non-cumulative penalty on a person who is already incurring cumulative penalties amounting to life imprisonment for refusal to register.

must be confined to matters reasonably related to the purposes of the Act and the setting in which the inquiry is made. Since the statements are required of persons who have been found to be and ordered to register as members of the Communist Party, the inquiry must be related to the further identification of such persons as Party members or to their activities in that organization.

"The conclusion is inescapable that the Communist Party is *sui generis*. The legislative array facing the Party virtually makes it a criminal conspiracy *per se*." *Communist Party v. United States*, 331 F. 2d 807, 812. Obviously, a person whom the government has found to be a member of such a conspiracy is privileged to refuse to answer any questions whatsoever that are related to his identity or activity as a member." *Hoffman v. United States*, 341 U. S. 479, sustained claims of privilege because (at 488), "In this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." (emphasis in original). No questions conceivably within the authority of the Attorney General under section 8(c) could survive this test.

We turn now from consideration of the questions the Attorney General *could* ask under section 8(c) to those that he has asked on form IS-52. Except for the false analogy to fingerprinting (G. Br. 29; *supra*, pp. 7-8), the government does not defend the inquiries on this form as non-incriminating. It avoids the issue by arguing that petitioners' claims of privilege against answering them (as distinguished from their claims against answering all inquiries within the competence of the Attorney General) is premature.

⁹ We have already discussed the fallacy of the government's contention (Br. 29) that inquiries for the purpose of identification are no different from fingerprinting.

The government acknowledges (Br. 17) that petitioners' privilege with regard to the submission of statements has been distinctly invoked and overruled. It argues however, that petitioners have not specifically claimed the privilege with respect to each question on form IS-52 (Br. 13-14), and it urges that they may do so only on the form itself at the time it is filed (Br. 28).

This, it is said (Br. 13) is because the Attorney General may alter form IS-52 before petitioners are compelled to submit it. But the government does not indicate what non-incriminating questions the Attorney General is authorized to ask in lieu of the questions that appear on the form. And, as we have seen (*supra*, p. 11), there are none. Furthermore, implicit in this contention is the thought that the Attorney General has authority to compel an answer to any inquiry he may see fit to make. But if he has such authority, section 8(c) is unconstitutional as a delegation of legislative power and a violation of the Fourth Amendment. See Pet. Br. 34-35.

Next, it is argued (Br. 13) that petitioner's claims are premature because the Attorney General may accept something less than full compliance with the demands of form IS-52. But the instruction sheet accompanying the form (Pet. Br. 66) specifically states that, "All items of the form are to be answered." If the Attorney General had concluded that some of these items are unauthorized or superfluous, he would have advised petitioners and the Court that he was withdrawing them. Instead, the government's brief (p. 28-29) defends all of the items as akin to fingerprinting.

Rabinowitz v. Kennedy, 376 U. S. 605, on which the government relies (Br. 13) is not comparable. There the government acknowledged (at 610) that some of the questions on the registration form were "clearly inapplicable" to the petitioners, and the rules of the Department of Justice, printed on the registration form, permitted a registrant to

apply for a waiver of any of the form's requirements. Here, in contrast, the failure to adjudicate petitioners' claims in this proceeding would compel them to risk five year prison sentences on a speculation as to what might satisfy the Attorney General.

It is also said (G. Br. 13) that the privilege issue is premature because the Attorney General may see fit to honor claims of the petitioners with respect to some of the demands of form IS-52 when made on the form itself. But all of the facts and circumstances on which petitioners rely to support their claims are known to the Attorney General at this time. And the government has already denied petitioners' claims by arguing (Br. 28-29) that none of the items on the form calls for incriminating replies. Hence the claims are ripe for adjudication.

Finally, the government argues (Br. 27-28) that *United States v. Sullivan*, 274 U. S. 259, is controlling. *Sullivan* held that a taxpayer could not, on self-incrimination grounds, refuse to file an income tax return but was required to claim his privilege as to particular inquiries on the return itself.

Sullivan differs from the present case in two vital respects. First, the filing of income tax returns is a general obligation applicable to all taxpayers, not one which is addressed only to those suspected or accused of wrongdoing. Under the Act, in contrast, the duty to file registration statements falls only on those who have been singled out by the Attorney General as, and found by the Board to be, members of an organization which Congressional legislation has made virtually "a criminal conspiracy per se." *Communist Party v. United States*, *supra*, at 812. Second, because of the neutral setting in which income tax returns are required and the nature of the information they demand, the Court in *Sullivan* could not say *in limine* that all of the inquiries on the return would require self-incrimina-

tion. Here, on the contrary, it is clear that responses to any of the items on form IS-52 might incriminate petitioners. See Pet. Br. 23-24 and *supra*, p. 11.

III. Substantive Due Process.

Our principal brief (pp. 33-35) argued that compulsory registration under the Act violates due process because there is no governmental purpose for this deprivation of personal liberty.

As we have shown above, the government's effort to discover a governmental purpose in the member registration requirement has been fruitless. The government (Br. 31) also argues that, even if purposeless, the requirement is valid because "petitioners are not hurt by [it]."

However, the "liberty" which the constitution protects is the liberty of an individual to do what he pleases. Consequently, he may not be compelled to obey a command of the state unless it serves some legitimate state interest. "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling v. Sharpe*, 347 U. S. 497, 499-500.

Moreover, it is idle for the government to say that compulsory registration does not "hurt" the registrant. Congress obviously thought otherwise, or it would not have employed cumulative penalties amounting to life imprisonment as the means of enforcing compliance. And, in addition to First Amendment considerations (*infra*, pp. 14-17), the member registration requirement "hurts" by coercing confessions (*supra*, p. 9 and n. 7, and invading privacy.

IV. The First Amendment.

A. Our principal brief (pp. 37-39) showed that the member registration requirement violates the First Amendment because it compels a registrant to make declarations

which are contrary to his conscience and belief, invade his privacy and are self defamatory.

The government's inability to grasp, let alone answer, this point is exemplified by the assertion (Br. 36) that, "If petitioners were asked squarely whether or not they are members of the Communist Party, they . . . would not be heard to claim that a response to the question would be a 'declaration of political belief' which could not be compelled consistently with the First Amendment." The government has evidently forgotten decisions like *Barenblatt v. United States*, 360 U. S. 109, where it was only a bare majority of the Court that refused to honor the refusal of a witness, on First Amendment grounds, to answer this very question. The majority acknowledged (at 126) that, "Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships." It concluded (at 134) only that in the case before it, "that the balance between the individual and the governmental interest here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended." Since, in the present case, there is no governmental interest at stake (Pet. Br. 33-34 and *supra*, pp. 1-4), *Barenblatt* requires the balance to be struck in favor of petitioners.

The demand here is worse than that in *Barenblatt*. For here it is not that the individual disclose his political affiliation but is, rather, that he admit, perhaps untruthfully (Pet Br. 35, 38), to a particular affiliation and defame the organization in which he supposedly holds membership. Less obnoxious loyalty oaths have traditionally been resisted on grounds of conscience.

The government's insensitivity to the interests which the Amendment protects is illustrated by the argument (Br. 35) that registration is not "a meaningful declaration

at all," since it is made "under compulsion of a Board order." By this perverse logic, *West Virginia Board of Education v. Barnette*, 319 U. S. 624, was wrongly decided because the flag salute it invalidated was compulsory.

In like vein the government believes (Br. 34) that the exaction of political avowals is not within the ambit of the First Amendment unless the declarants are also required to "forswear the goals or means of the organizations with which they are associated." It argues (*ibid.*) that the absence of the latter requirement distinguishes this case from *Barnette* and the Labor Board cases cited in Pet. Br. 39. But *Barnette* (at 633) found it irrelevant to determine whether the regulation imposing the flag salute "contemplates that pupils forego any contrary convictions of their own and becoming unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning."

B. Our principal brief (pp. 39-41) showed that the member registration requirement also violates the First Amendment because its restraint on freedom of association is over-broad and cannot find justification in any public interest. The government does not deny that the requirement restrains association. It argues (Br. 36-38) that under *Communist Party v. S. A. C. B.*, 367 U. S. 1, the restraint is justified by the need of removing the "mask of anonymity" from Communist Party members.

We believe that the decision in the *Communist Party* case was incorrect and should be reconsidered and overruled. Grounds for that belief are stated in the brief for petitioner and the dissenting opinion of Justice Black in that case, and in the amicus brief for the National Lawyers Guild in this case.

In any event, the *Communist Party* case is inapplicable. The findings and orders of the Board remove the "mask of

anonymity" from those found to be Communist Party members, making their self-registration as such superfluous (Pet. Br. 33-34). And there is no other justification for the self-registration requirement.

V. Procedural due process and the prohibition against bills of attainder.

A. Our principal brief (pp. 42-48) argued that petitioners have been denied due process and subjected to attainder by the provisions of the Act and the ruling of the Board which precluded them from challenging the correctness or current validity of the Board's 1953 determination in the *Communist Party* case that the Party was a Communist-action organization.

The government argues (Br. 40) that it would be impractical to permit relitigation of the Party's status in each member registration proceeding. But constitutional rights cannot be sacrificed to considerations of administrative convenience.

It is also argued (Br. 40-41) that the 1953 status of the Communist Party may be presumed unchanged inasmuch as the organization has not sought to present the Board with evidence of a change. The fact that the Act does not permit an unregistered organization to do so is said to be immaterial (Br. 41) because "the Party chose not to register." What the Party has chosen is to litigate its constitutional right not to be compelled to register—an issue which the majority held premature in the *Communist Party* case (Pet. Br. 45). Certainly, it cannot be required to forego its constitutional right to litigate this issue as the price of securing its constitutional right to seek a redetermination of its status. Still less may the

constitutional rights of the members be denied because the organization has elected to assert its own.¹⁰

The government says (Br. 42) that the Act is not a bill of attainder merely because it commits the determination of the status of an accused organization to an administrative agency and not to a court. This misconceives our argument (Pet. Br. 45-47) which is that the Act attaints petitioners because it permits them no escape from the Board's 1953 determination of the status of the Communist Party, even though that determination has no current validity. As our principal brief showed (*ibid.*), the Act therefore satisfies the criteria of bills of attainder stated in *United States v. Brown*, 381 U. S. 437, and in the *Communist Party* case.

B. Our principal brief (pp. 48-51) showed that the description of a world Communist movement contained in section 2 of the Act, as interpreted by the Board, is anachronistic; that, under the decision in the *Communist Party* case, the Board and the courts are required to notice this fact, and therefore to invalidate the Board's 1953 determination that the Communist Party is a Communist-action organization.

It is no answer to this showing to say (G. Br. 41, n. 19) that the excerpts from authoritative sources contained in our principal brief (pp. 49-50) "are merely personal views on which the Board might pass if they were properly presented at an appropriate hearing." The political realities to which these excerpts refer are matters of common knowledge and, hence, under the *Communist Party* case, must be noticed. Moreover, the Board's ruling (R. 13-14) that petitioners were bound by its 1953 determination establishes

¹⁰ The government argues (Br. 41) that the Party could have employed some procedure other than that accorded by the Act for a redetermination of its status. But the nature of such a procedure is not indicated and, in fact, there is none.

that, in its view, there is no "appropriate hearing" for consideration of the current realities concerning "the world Communist movement."

VI. The denial of a judicial and jury trial.

Our principal brief (pp. 51-55) showed that, in prosecutions for failure to register, the Act unconstitutionally denies the accused indictment by grand jury, trial by judge and jury, and the requirement of proof beyond a reasonable doubt on the issues of (a) whether the accused is a member of the Communist Party and (b) whether the Party is a communist-action organization.

The government says (Br. 43) that this objection is premature and must await adjudication in a criminal prosecution for failure to register.

The government, however, studiously ignores our argument that under the doctrine of *Ex Parte Young*, 209 U. S. 123, petitioners are constitutionally entitled to have their contentions adjudicated in a civil proceeding before incurring the enormous cumulative criminal penalties which the Act visits on those who violate registration orders.

On the merits of the point, the government is obviously in error in assuming that any or all elements of an offense can be predetermined administratively, leaving for the judicial trial only the question of compliance with the administrative order.

Even for the purposes of imposing a civil sanction, Congress may not commit to the administrative process adjudication of claims of American citizenship. Due process guarantees a *de novo* judicial trial of such claims. *Ng Fung Ho v. White*, 259 U. S. 276, 282-84. Nor may a State substitute administrative for judicial adjudication of what constitutes obscene literature for regulatory purposes. *Bantam Books v. Sullivan*, 372 U. S. 58, 69-70. Still less can criminal punishment be based on an administrative determination of the vital elements of the offense. This is

the meaning of *Wong Wing v. United States*, 163 U. S. 228, and the opinion of Justices Jackson and Frankfurter in *United States v. Spector*, 343 U. S. 169 (see our principal Brief 52-53). The *Cox* and *Yakus* cases, on which the government relies (Br. 45), are not to the contrary for reasons stated in our principal brief (p. 54) and overlooked by the government.

The government misinterprets Justice Jackson's opinion in *Spector* in suggesting (Br. 46) that it derived from a doubt as to the availability of judicial review of deportation orders. To the contrary, Justice Jackson pointed out that since such a review is not the same as a criminal trial of the facts, it would not remove the constitutional defect of the self-deportation statute. See 343 U. S. at 179.

By the government's theory, Congress can virtually eliminate the constitutional safeguards of criminal procedure simply by splitting off for exclusive administrative adjudication the vital and controversial elements of a criminal offense. So, for example, Congress could authorize the Internal Revenue Service to determine that a person had received certain income, and make this determination conclusive in a prosecution of the person for failing to include the income in his tax return. Such a proposition is refuted by its mere statement and was rejected in *United States v. England*, 347 F. 2d 425, 438-43.

The government's analogy (Br. 44-45) to statutes which provide for court orders requiring compliance with administrative decisions is false. Such orders are commonly enforced by civil contempt. Moreover, the criminal contempt power is *sui generis* and cannot supply a precedent for eliminating the constitutional requisites of criminal prosecutions. *Green v. United States*, 356 U.S. 165, 183-87, 189-91, 193-219. Finally, the criminal contempt power could not sustain the infliction without trial by jury of penalties

as severe as those provided by the Act. *United States v. Barnett*, 376 U. S. 681.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 3.—OCTOBER TERM, 1965.

William Albertson and Roscoe Quincy Proctor, Petitioners, v. Subversive Activities Control Board.	}	On Writ of Certiorari to the United States Court of Appeals for the District of Colum- bia Circuit.
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[November 15, 1965.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Communist Party of the United States of America failed to register with the Attorney General as required by the order of the Subversive Activities Control Board sustained in *Communist Party of the United States v. SACB*, 367 U. S. 1.¹ Accordingly, no list of Party members was filed as required by § 7 (d) (4) of the Subversive Activities Control Act of 1950, 50 U. S. C. § 786 (d) (4) (1964 ed.).² Sections 8 (a) and (c) of the Act provide that, in that circumstance, each member of the organization must register and file a registration statement; in default thereof, § 13 (a) authorizes the Attorney General to petition the Board for an order requiring

¹ The conviction of the Party for failure to register was reversed by the Court of Appeals for the District of Columbia Circuit, and remanded for a new trial. *Communist Party of the United States v. United States*, 331 F. 2d 807.

² Under this section the registration statement which accompanies the registration of a Communist-action organization is required to include "the name and last known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement."

the member to register.³ The Attorney General invoked § 13 (a) against petitioners, and the Board, after evidentiary hearings, determined that petitioners were Party members and ordered each of them to register pursuant to §§ 8 (a) and (c). Review of the orders was sought by petitioners in the Court of Appeals for the District of Columbia Circuit under § 14 (a).⁴ The Court of Appeals

³ Sections 8 (a) and (c), 50 U. S. C. §§ 787 (a) and (c) (1964 ed.), provide:

"(a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 786 (a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 786 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

"(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe."

Section 13 (a), 50 U. S. C. § 792 (a) (1964 ed.), provides:

"Whenever the Attorney General shall have reason to believe that . . . any individual who has not registered under section 787 of this title is in fact required to register under such section, he shall file with the Board and serve upon such . . . individual a petition for an order requiring such . . . individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order."

⁴ Section 14 (a), 50 U. S. C. § 793 (a) (1964 ed.), provides:

"The party aggrieved by any order entered by the Board may obtain the review of such order by filing in the United States Court of Appeals for the District of Columbia, within 60 days from the

affirmed the orders, 332 F. 2d 317. We granted certiorari, 381 U. S. 910. We reverse.*

I.

Petitioners address several constitutional challenges to the validity of the orders, but we consider only the contention that the orders violate their Fifth Amendment privilege against self-incrimination.*

The Court of Appeals affirmed the orders without deciding the privilege issue, expressing the view that under our decision in *Communist Party*, 367 U. S., at 105-110, the issue was not ripe for adjudication and would be ripe only in a prosecution for failure to register if the petitioners did not register. 332 F. 2d, at 321-323. We disagree. In *Communist Party* the Party

date of service upon it of such order, a written petition praying that the order of the Board be set aside . . . upon the filing of such petition the Court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the Order of the Board The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari. . . ."

* The Government's opposition to the petition for certiorari suggested that the case is moot as to petitioner Albertson by reason of his alleged expulsion from the Party. Albertson, however, challenges the suggestion of mootness. There is no occasion to decide the question since, in any event, we must reach the merits of the issues in respect of an identical order issued against petitioner Proctor.

* Petitioners' other challenges assailed the Act and registration orders as denying substantive due process (because they allegedly serve no governmental purpose), as abridging First Amendment freedoms, as violating procedural due process and constituting bills of attainder (because they made the Board's 1953 determination that the Communist Party was a Communist-action organization conclusive upon petitioners), and finally, as denying petitioners the safeguards of grand jury indictment, judicial trial and trial by jury.

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asserted the privilege on behalf of unnamed officers—those obliged to register the Party and those obliged “to register for” the Party if it failed to do so.¹ The self-incrimination claim asserted on behalf of the latter officers was held premature because the Party might choose to register and thus the duty of those officers might never arise. Here, in contrast, the contingencies upon which the members’ duty to register arises have already matured; the Party did not register within 30 days after the order to register became final and the requisite 60 days since the order became final have elapsed. As to the officers obliged to register the Party, *Communist Party* held that the self-incrimination claim asserted on their behalf was not ripe for adjudication because it was not known whether they would ever claim the privilege or whether the claim, if asserted, would be honored by the Attorney General. But with respect to the orders in this case, addressed to named individuals, both these contingencies are foreclosed. Petitioners asserted the privilege in their answers to the Attorney General’s petitions; they did not testify at the Board hearings; they again asserted the privilege in the review proceedings in the Court of Appeals. In each instance the Attorney General rejected their claims. Thus, the considerations which led the Court in *Communist Party* to hold that the claims on behalf of unnamed officers were premature are not present in this case.

There are other reasons for holding that petitioners’ self-incrimination claims are ripe for decision. Specific

¹ The regulations governing Party registration pursuant to § 7 (d), 50 U. S. C. § 786 (d), are 28 CFR §§ 11.200, 11.201, and the forms are IS-51a and IS-51. The regulations governing officers obliged by § 7 (h), 50 U. S. C. § 786 (h) “to register for” the Party if it failed to register are 82 CFR § 11.205. See *Communist Party*, 367 U. S., at 105-110.

orders requiring petitioners to register have been issued. The Attorney General has promulgated regulations requiring that registration shall be accomplished on Form IS-52a and that the accompanying registration statement shall be a completed Form IS-52,^{*} 28 CFR §§ 11.206, 11.207, and petitioners risk very heavy penalties if they fail to register by completing and filing these forms. Under § 15 (a)(2) of the Act, for example, each day of failure to register constitutes a separate offense punishable by a fine up to \$10,000 or imprisonment up to five years, or both.^{*} Petitioners must either register without a decision on the merits of their privilege claims, or fail to register and risk onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them. To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so.

Indeed the Government concedes in its brief in this Court that the Court of Appeals' holding of prematurity was erroneous insofar as petitioners' claims of privilege relate to the Board's power to compel the act of regis-

^{*} Copies of Form IS-52a and Form IS-52 are reproduced in the Appendix to this opinion.

^{*} The case was argued orally by both sides on the premise that the penalty for failure to complete and file Form IS-52 constituted a separate offense punishable by fine of \$10,000 or imprisonment of five years, but that each day of failure to file the form did not constitute a separate offense. We have no occasion, however, to decide the question, and intimate no view upon it. See § 15 (b), 50 U. S. C. § 794 (b).

tration and the submission of an accompanying registration statement. The brief candidly acknowledges that, since § 14 (b) provides for judicial review of a Board order to register, petitioners' claims in that regard, like any other contention that an order is invalid, may be heard and determined by the reviewing court—thus distinguishing orders that are not similarly reviewable, see *Alexander v. United States*, 201 U. S. 117; *Cobbledick v. United States*, 309 U. S. 303. Nevertheless, the Government argues that petitioners' claims are premature insofar as they relate to "any particular inquiry" on Forms IS-52a and IS-52. Two contingencies are hypothesized in support of this contention: (1) that the Attorney General might alter the present forms or (2) that he might accept less than fully completed forms.

The distinction upon which this argument is predicated is illusory. Neither the statute nor the regulations draw any distinction between the act of registering and the submission of a registration statement, on the one hand, and, on the other hand, the answering of the inquiries demanded by the forms; the statute and regulations contemplate rather that the questions asked on the forms are to be fully and completely answered. Moreover, the contingencies hypothesized are irrelevant. Petitioners are obliged to register and to submit registration forms in accordance with presently existing regulations; the mere contingency that the Attorney General might revise the regulations at some future time does not render premature their challenge to the existing requirements. Nor can these requirements be viewed as requiring that petitioners answer—at the risk of criminal prosecution for error—only those items which will not incriminate petitioners; full compliance is required. Finally, the Government's argument would do violence to the congress-

sional scheme. The penalties are incurred only upon failure to register as required by final orders and, under § 14 (b), orders become final upon completion of judicial review. In so providing, Congress plainly manifested an intention to afford alleged members, prior to criminal prosecution for failure to register, an adjudication of all, not just some, of the claims addressed to the validity of the Board's registration orders. We therefore proceed to a determination of the merits of petitioners' self-incrimination claims.

II.

The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act, 18 U. S. C. § 2385 (1964 ed.), or under § 4 (a) of the Subversive Activities Control Act, 50 U. S. C. § 783 (a) (1964 ed.), to mention only two federal criminal statutes. *Scales v. United States*, 367 U. S. 203, 211. Accordingly, we have held that mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege. *Patricia Blau v. United States*, 340 U. S. 159; *Irving Blau v. United States*, 340 U. S. 332; *Brunner v. United States*, 343 U. S. 918; *Quinn v. United States*, 349 U. S. 155. These cases involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes. Cf. *People of New York v. Reardon*, 197 N. Y. 236, 243-244, 90 N. E. 829, 832. It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause.

The statutory scheme, in providing that registration "shall be accompanied" by a registration statement, clearly implies that there is a duty to file Form IS-52, the registration statement, only if there is an enforceable obligation to accomplish registration by completing and filing Form IS-52a. Yet, even if the statute and regulations required petitioners to complete and file Form IS-52 without regard to the validity of the order to register on Form IS-52a, the requirement to complete and file Form IS-52 would also invade the privilege. Like the admission of Party membership demanded by Form IS-52a, the information called for by Form IS-52—the organization of which the registrant is a member, his aliases, place and date of birth, a list of offices held in the organization and duties thereof—might be used as evidence in or at least supply investigatory leads to a criminal prosecution. The Government, relying on *United States v. Sullivan*, 274 U. S. 259, argues that petitioners might answer some questions and appropriately claim the privilege on the form as to others, but cannot fail to submit a registration statement altogether. Apart from our conclusion that nothing in the Act or regulations permits less than literal and full compliance with the requirements of the form, the reliance on *Sullivan* is misplaced. *Sullivan* upheld a conviction for failure to file an income tax return on the theory that "[i]f the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U. S., at 263. That declaration was based on the view, *first*, that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and *second*, that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal

the final arbiter of the merits of the claim. But neither reason applies here. A tribunal, the Board, had an opportunity to pass upon the petitioners' self-incrimination claims; and since, unlike a tax return, the pervasive effect of the information called for by Form IS-52 is incriminatory, their claims are substantial and far from frivolous. In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.

III.

Section 4 (f) of the Act,¹⁰ the purported immunity provision, does not save the registration orders from petitioners' Fifth Amendment challenge. In *Counselman v. Hitchcock*, 142 U. S. 547, decided in 1892, the Court held "that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . .," and that such a statute is valid only if it supplies "a complete protection

¹⁰ Section 4 (f), 50 U. S. C. § 783 (f) provides:

"Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

from all the perils against which the constitutional prohibition was designed to guard . . ." by affording "absolute immunity against future prosecution for the offence to which the question relates." *Id.*, at 585-586. Measured by these standards, the immunity granted by § 4 (f) is not complete. See *Scales v. United States*, 367 U. S., at 206-219. It does not preclude any use of the information called for by Form IS-52, either as evidence or as an investigatory lead. With regard to the act of registering on Form IS-52a, § 4 (f) provides only that the admission of Party membership thus required shall not *per se* constitute a violation of §§ 4 (a) and (c) or any other criminal statute, or "be received in evidence" against a registrant in any criminal prosecution; it does not preclude the use of the admission as an investigatory lead, a use which is barred by the privilege. *Counselman v. Hitchcock*, 142 U. S., at 564-565, 585.¹¹

The Government does not contend that the shortcoming of § 4 (f) is remedied in regard to information called for on the registration statement, Form IS-52. With respect to Form IS-52a, however, the argument is made that, since an order to register is preceded by a Board finding of Party membership, the admission of membership required on that form would be of no investigatory value and thus is not "incriminatory" within the meaning of the Fifth Amendment privilege. On this view the incompleteness of the § 4 (f) grant of immunity would be rendered immaterial and the admission of Party mem-

¹¹ The legislative history includes several expressions of doubt that the immunity granted was coextensive with the privilege. See S. Rep. No. 2369, 81st Cong., 2d Sess., Pt. 2, pp. 12-13 (Sen. Kilgore) (Minority Report); 96 Cong. Rec. 14479, 15199 (Sen. Kefauver), 15554 (*ibid.*); see also 96 Cong. Rec. 13739-13740 (Rep. Celler), dealing with more modified immunity grant in H. R. 9490. See generally *Scales v. United States*, 367 U. S., at 212-219 (court opinion), 282-287 (dissenting opinion).

bership could be compelled without violating the privilege. We disagree. The judgment as to whether a disclosure would be "incriminatory" has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties. The threat to the privilege is no less present where it is proposed that this assessment be made in order to remedy a shortcoming in a statutory grant of immunity. The representation that the information demanded is of no utility is belied by the fact that the failure to make the disclosure is so severely sanctioned; and permitting the incompleteness of § 4 (f) to be cured by such a representation would render illusory the *Counselman* requirement that a statute, in order to supplant the privilege, must provide "complete protection from all the perils against which the constitutional prohibition was designed to guard."

The judgment of the Court of Appeals is reversed and the Board's orders are set aside.

It is so ordered.

MR. JUSTICE BLACK concurs in the reversal for all the reasons set out in the Court's opinion as well as those set out in his dissent in *Communist Party of the United States v. SACB*, 367 U. S. 1, 137.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

APPENDIX.

Form IS-52a is as follows:
Form No. IS-52a
(Ed. 9-6-61)

Budget Bureau No. 43-R414
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

REGISTRATION FORM FOR INDIVIDUALS

Pursuant to Section 8(a) or (b) of
the Internal Security Act of 1950

(NOTE: This form should be accompanied by a
Registration Statement, Form IS-52)

..... hereby
(Name of individual—Print or type)
registers as a member of,
a Communist-action organization.

/s/
(Signature) (Date)
.....
(Typed or printed name) (Date)
.....
(Address—type or print)

Form IS-52 is as follows:

Budget Bureau No. 43-R301.2
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

FORM IS-52

for

REGISTRATION STATEMENTS OF INDIVIDUALS

Pursuant to section 8 of the Internal
Security Act of 1950

INSTRUCTION SHEET—READ CAREFULLY

1. All individuals required to register under section 8 of the Internal Security Act of 1950 shall use this form for their registration statements.

2. Two copies of the statement are to me filed. An additional copy of the statement should be prepared and retained by the Registrant for future references.

3. The statement is to be filed with the Internal Security Division, Department of Justice, Washington, D. C.

4. All items of the form are to be answered. Where the answer to an item is "None" or "inapplicable," it should be so stated.

5. Both copies of the statement are to be signed. The making of any willful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

6. If the space provided on the form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the answer given.

FOR AN INDIVIDUAL

a. Who is a member of any Communist-action organization which has failed to file a registration statement as required by Section 7(a) of the Internal Security Act of 1950.

OR

b. Who is a member of any organization which has registered as a Communist-action organization under Section 7(a) of the Internal Security Act of 1950 but which has failed to include the individual's name upon the list of members filed with the Attorney General.

1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.

2.(a) Name of Registrant.

(b) All other names used by Registrant during the past ten years and dates when used.

(c) Date of birth.

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(d) Place of birth.

3.(a) Present business address.

(b) Present residence address.

4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:

(a) List all offices so held and the date when held.

(b) Give a description of the duties or functions performed during tenure of office.

The undersigned certifies that he has read the information set forth in this statement, that he is familiar with the contents thereof, and that such contents are in their entirety true and accurate to the best of his knowledge and belief. The undersigned further represents that he is familiar with the provisions of Section 1001, Title 18, U. S. Code (printed at the bottom of this form).*

/s/
(Signature) (Date)
/T/
(Name) (date)
(Print or type)

* 18 U. S. C., Section 1001, provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

SUPREME COURT OF THE UNITED STATES

No. 3.—OCTOBER TERM, 1965.

William Albertson and Roscoe Quincy Proctor, Petitioners, v. Subversive Activities Control Board.	}	On Writ of Certiorari to the United States Court of Appeals for the District of Colum- bia Circuit.
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[November 15, 1965.]

MR. JUSTICE CLARK, concurring.

I join in the opinion of the Court. The conclusion it reaches today was forecast in 1948. In response to the request of the Chairman of the Senate Judiciary Committee for an expression of the views of the Department of Justice on H. R. 5852, a precursor of the Act here under attack, it was then pointed out that the "measure might be held . . . even to compel self-incrimination."*

This view was expressed in a letter over my signature as Attorney General which noted that the proposed legislation "would require every Communist political organization and every Communist-front organization to register In addition to information which would be required of both organizations in common, a Communist political organization would be obliged to disclose the names and addresses of its members in its registration statement. . . . In case of failure of any organization to register in accordance with the measure, it would be the duty of the executive officer and the secretary of such organization to register in behalf of the organization. . . . A failure to register . . . subjects the organization and certain of its agents to severe penalties." After consideration of other provisions of the bill

*Hearings on H. R. 5852 before the Senate Committee on the Judiciary, 80th Cong., 2d Sess., 422 (1948).

2 ALBERTSON v. SUBVERSIVE BOARD.

the letter advised that the Department of Justice had concluded that "the measure might be held (notwithstanding the legislative finding of clear and present danger) to deny freedom of speech, of the press, and of assembly, and even to compel self-incrimination." It also expressed the belief of the Department that "there would not be any voluntary registrations under the measure. Should a Communist organization fail to register, the burden to proceed would shift to the Attorney General . . . to prove that the organization is required to register."

As finally passed, the Act imposed a duty to register upon individual members after the refusal of the Communist Party to register and disclose its membership. Though not in H. R. 5852 about which the Department of Justice expressed constitutional doubts, this more pervasive registration requirement directly abridges the privilege of members against self-incrimination. I therefore join in this reversal.

